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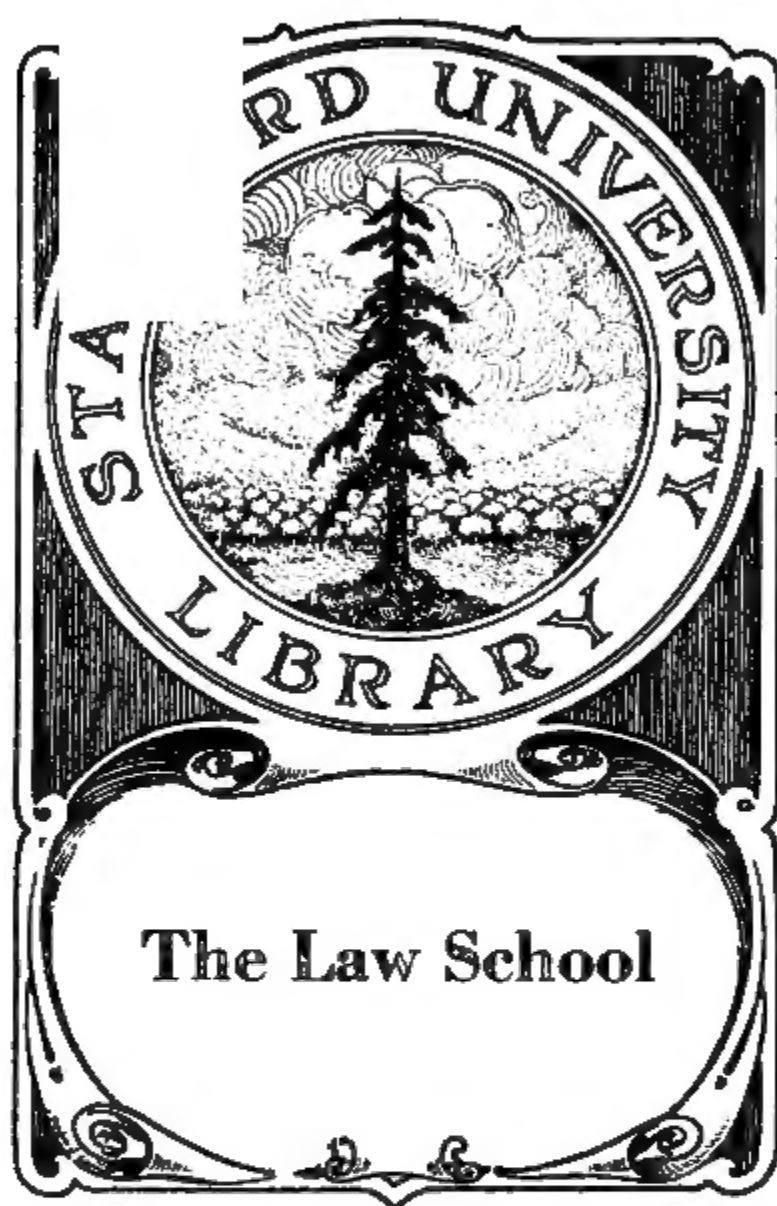
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CASES DECIDED

ON THE

2475

BRITISH NORTH AMERICA ACT, 1867,

IN

THE PRIVY COUNCIL, THE SUPREME COURT OF
CANADA AND THE PROVINCIAL COURTS.

COLLECTED AND EDITED BY
JOHN R. CARTWRIGHT,
One of Her Majesty's Counsel.

VOL. IV.

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PREFACE.

The present volume contains the reported cases in the Privy Council, the Supreme Court of Canada and the Courts of the Province of Ontario in continuation of those previously published.

The method of arrangement adopted in the former volumes has been retained.

The head notes with a few exceptions have been revised or re-written.

Where any part of a judgment is omitted the omission is marked by asterisks or otherwise, the matters omitted being such only as do not relate to the constitutional points. Square brackets thus [] show that the words placed within them are introduced by the editor.

The numbers inserted in the margin refer to the pages of the original reports.

All quotations and references have as far as possible been verified and corrected.

April, 1892.

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PRIVY COUNCIL.

RIEL.....Appellant;

AND

THE QUEEN.....Respondent.

EX PARTE RIEL.

J. C.*
1885

Oct. 21, 22.

On appeal from the Court of Queen's Bench for the Province of Manitoba.

(Reported 10 App. Cas. 675.)

Practice—Leave to appeal in Criminal Cases—validity of 43 Vict. c. 25 (Canada).

The rule of the Judicial Committee is not to grant leave to appeal in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place.

Held, that 34 and 35 Vict, c. 28, which authorizes the Parliament of Canada to provide for "the administration, peace, order and good government of any territory, not for the time being included in any Province," vests in that Parliament the utmost discretion of enactment for the attainment of those objects. Accordingly Canadian Act 43 Vict. c. 25, is *intra vires* the Legislature.

Sect. 76, sub-section 7, which prescribes that full notes of evidence be taken, is literally complied with when those notes are taken in shorthand.

In July, 1885, the petitioner was tried for the crime of treason before a stipendiary magistrate and a justice of the peace, with the intervention of a jury of six persons, in the North-West Territories of the Dominion of Canada, and having been found guilty was sentenced to death.

**Present* :—THE LORD CHANCELLOR (LORD HALSBURY), LORD FITZGERALD, LORD MONESWELL, LORD HOBHOUSE, LORD ESHER, and SIR BARNES PEACOCK.

1885

RIEL

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Statement.

The Court of Queen's Bench for the Province of Manitoba in appeal, confirmed the sentence.

The petitioner applied for special leave to appeal on the grounds, as stated in his petition, that the stipendiary magistrate and justice had no jurisdiction to try him for treason : if they had there were errors in procedure which vitiated the trial, viz. ; there was no indictment preferred by a grand jury, no coroner's inquisition, the evidence was not taken down in writing as required by statute.

[676] *Bigham*, Q. C. (*Jeune* and *Fitzpatrick* of the Canadian Bar with him) for the petitioner, contended that leave ought to be granted. A substantial question of law arose, whether the Court of first instance had jurisdiction to try the prisoner in the way it did. After referring to the British North America Act, 1867, ss. 17, 18, 58, 69, 91 and 92, and especially sub-sect. 27 of the latter section, as showing the powers of the Dominion Parliament and Provincial Governments and Legislatures ; sect. 146 ; sect. 129 ; 31 and 32 Vict. c. 105 ; Canadian Acts 32 and 33 Vict. c. 3, and 33 Vict. c. 3 ; Imperial Act, 34 and 35 Vict. c. 28 (British North America Act, 1871), s. 4, it was observed that the offence and trial were not in Manitoba, but in the North-West Territory, which became part of the Dominion under the Act of 1871 ; and that the petitioner was consequently tried under 43 Vict. c. 25 (Canada), s. 76 being the important section. The subsections do not give jurisdiction ; if they purport so to do they are *ultra vires* of the legislature. Treason is in a peculiar manner an offence against the State, and the Imperial Parliament could not have intended that the Dominion Parliament should legislate upon it to the extent of altering the statutory rights of a man put upon

his trial regarding it. The petitioner is entitled to all the rights which he possessed under English law, unless they have been specifically taken away. He possesses statutory rights under 7 and 8, Will. 3, c. 3, to a trial before a judge and by a jury of twelve, with a right of challenging thirty-five. The Dominion Parliament, under the British North America Act, 1871, s. 4, has no power to take away those rights, and render him liable to be tried before two magistrates and a jury of six, with a right of challenging six. The Act relied upon was not necessary for peace, order and good conduct.

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[SIR BARNES PEACOCK :—The same words occur in the Act under which the Indian Penal Code and Code of Criminal Procedure were passed and authorized those Acts.]

Reference was then made to sub-sect. 7 of sect. 76 of the Act of 1880, and objection was made that the evidence was taken in shorthand, not legible to any one but a particular person. It was not writing within the meaning of the section.

[677] [LORD HALSBURY, L.C. :—Is there any authority for appeal in criminal cases?]

Reg. v. Murphy (1); *Reg. v. Bertrand* (2); *Reg. v. Coote* (3).

The Attorney-General (Sir Richard Webster, Q. C.,) *R. S. Wright* and *Danckwerts*, for the Crown, were not called upon.

Burbidge, Q. C. (the Canadian Deputy Minister of Justice), represented the Government of Canada.

The judgment of their Lordships was delivered by LORD HALSBURY, L. C. :—

This is a petition of Louis Riel, tried in July last at

(1) L. R. 2 P. C. 535.

(2) L. R. 1 P. C. 520.

(3) L. R. 4 P. C. 599;

ante, vol. 1 p. 57.

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Regina, in the North-West Territories of Canada, and convicted of high treason and sentenced to death, for leave to appeal against an order of the Queen's Bench of Manitoba, confirming that conviction.

It is the usual rule of this committee not to grant leave to appeal in criminal cases, except where some clear departure from the requirements of justice is alleged to have taken place. Whether in this case the prerogative to grant an appeal still exists as their Lordships have not heard that question argued, they desire neither to affirm nor to deny, but they are clearly of opinion that in this case leave should not be given. The petitioner was tried under the provisions of an Act passed by the Canadian Legislature, providing for the administration of criminal justice for those portions of the North-West Territory of Canada in which the offence charged against the petitioner is alleged to have been committed. No question has been raised that the facts as alleged were not proved to have taken place, nor was it denied before the original tribunal, or before the Court of Appeal in Manitoba, that the acts attributed to the petitioner amounted to the crime of high treason.

The defence upon the facts sought to be established before the jury was, that the petitioner was not responsible for his acts by reason of mental infirmity.

[678] The jury before whom the petitioner was tried negatived that defence, and no argument has been presented to their Lordships, directed to show that that finding was otherwise than correct. Of the objections raised on the face of the petition two points only seem to be capable of plausible, or, indeed, intelligible expression, and they have been urged before their Lordships with as much force as was possible, and as fully and completely in their Lordships' opinion as they would have been if leave

to appeal had been granted, and they have been dealt with by the judgments of the Court of Appeal in Manitoba with a patience, learning, and ability that leaves very little to be said upon them.

The first point is that the Act itself under which the petitioner was tried was *ultra vires* the Dominion Parliament to enact. That parliament derived its authority for the passing of that statute from the Imperial statute, 34 and 35 Vict. c. 28, which enacted that the Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory, not for the time being included in any province. It is not denied that the place in question was one in respect of which the Parliament of Canada was authorized to make such provision, but it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good government cannot, as matters of law, be provisions for peace, order, and good government in the territories to which the statute relates, and further that, if a Court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to those objects, but which a Court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.

Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure, as it is known and practised in this country, have been authorized in Her Majesty's Indian

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[679] Empire. Forms of procedure unknown to the English common law, have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence. There was indeed a contention upon the construction of the Canadian statute 43 Vict. c. 25, that high treason was not included in the words "any other crimes," but it is too clear for argument, even without the assistance afforded by the 10th sub-section, that the Dominion Legislature contemplated high treason as comprehended within the language employed.

The second point suggested assumes the validity of the Act, but is founded upon the assumption that the Act has not been complied with. By the 7th sub-section of the 76th section, it is provided that the magistrate shall take or cause to be taken in writing, full notes of the evidence and other proceedings thereat, and it is suggested that this provision has not been complied with, because, though no complaint is made of inaccuracy or mistake, it is said that the notes were taken by a shorthand writer, under the authority of the magistrate, and by a subsequent process extended into ordinary writing, intelligible to all. Their Lordships desire to express no opinion what would have been the effect if the provision of the statute had not been complied with, because it is unnecessary to consider whether the provision is directory only, or whether the failure to comply with it would be ground for error, inasmuch as they are of opinion that the taking full notes of the evidence in shorthand was a causing to be taken in writing full notes of the evidence, and a literal compliance therefore with the statute.

Their Lordships will, therefore, humbly advise Her Majesty that leave should not be granted to prosecute this appeal.

## PRIVY COUNCIL.

BANK OF TORONTO.....*Defendant* ; J. C.\*  
 1887  
 AND  
 LAMBE .....*Plaintiff*. June 10, 11, 22,  
 29 ; July 9.  
 MERCHANTS' BANK OF CANADA.....*Defendant* ;  
 AND  
 LAMBE .....*Plaintiff*.  
 CANADIAN BANK OF COMMERCE.....*Defendant* ;  
 AND  
 LAMBE .....*Plaintiff*.  
 NORTH BRITISH MERCANTILE INSURANCE } *Defendants* ;  
 COMPANY, AND OTHERS,  
 AND  
 LAMBE .....*Plaintiff*.

*On appeal from the Court of Queen's Bench for Lower Canada,  
 Province of Quebec.*

*(Reported 12 App. Cas. 575.)*

*Law of Canada—Distribution of Legislative Powers—British North  
 America Act, 1867, s. 91, sub. ss. 2, 3, 15, s. 92,  
 sub. s. 2—Direct Taxation.*

*Held*, that Quebec Act, 45 Vict., c. 22, which imposes certain direct  
 taxes on certain commercial corporations carrying on business  
 in the Province, is *intra vires* of the Provincial Legislature.

A tax imposed upon banks which carry on business within the  
 Province, varying in amount with the paid-up capital and with  
 the number of its offices, whether or not their principal place  
 of business is within the Province, is direct taxation within  
 clause 2 of sect. 92 of the British North America Act, 1867,  
 the meaning of which is not restricted in this respect by either  
 clause 2, 3 or 15 of sect. 91.

Similarly with regard to insurance companies taxed in a sum speci-  
 fied by the Act.

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\**Present* :—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEA-  
 COCK, SIR RICHARD BAGGALLY, and SIR RICHARD COUCH.



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 Statement.  
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The first three appeals were from three decrees of the Court of Queen's Bench (Jan. 23, 1885), reversing decrees [576] of the Superior Court for Lower Canada in the district of Montreal (May 12, 1883); the fourth appeal was from a decree of the Court of Queen's Bench (Jan. 23, 1885), affirming a decree of the Superior Court (May 23, 1884).

The several actions were brought by the respondent in his capacity of license inspector for the revenue district of Montreal against the several appellants, to recover the amount of certain taxes imposed on the appellants by Quebec Act, 45 Vict., c. 22. With the fourth action thirty-seven other actions by the same plaintiff against thirty-seven other insurance companies had been consolidated. The question in all the cases was, whether the Act in question was valid, which depended upon whether it was within the powers conferred upon the Provincial Legislatures by the British North America Act of 1867. The four appeals were not heard together; but as the question in issue was the same, their Lordships intimated at the close of the appellant's arguments in the first case that they would either deliver judgment therein before hearing the later appeals or reserve judgment until they had heard two counsel in respect of all three appeals.

The facts are stated in the judgment of their Lordships.

*W. H. Kerr*, Q. C. (Canada), and *Kenelm Digby*, for the appellant in the first appeal.

*Cohen*, Q. C., and *W. W. Kerr*, for the appellant in the second appeal.

*Blake*, Q. C. (Canada), and *Jeune*, in the third appeal.

*W. H. Kerr*, Q. C. (Canada), and *W. W. Kerr*, in the fourth appeal.

*Geoffrion*, Q.C. (Canada), and *Fullarton*, for the respondent in all the appeals.

*Kerr*, Q.C., and *Digby*, in the first appeal contended that the judgment of the Supreme Court was wrong, and that 45 Vict., c. 22, was void.

The question of its validity turns on (1) the construction of sect. 92 of the British North America Act, 1867, (2) on the further question whether even if the statute is *prima facie* within the powers conferred by sect. 92 its subject matter does not belong to the matters exclusively reserved to the Dominion Parliament by sect. 91. In the latter case the provisions of sect. 92, if construed unfavourably to the appellant, are overborne by those of sect. 91, and the statute is invalid. Reference was made to *Attorney-General for Quebec v. Queen Insurance Company* (1); *Citizens Insurance Company v. Parsons* (2); *Dobie v. Temporalities Board* (3); *Russell v. The Queen* (4); *Hodge v. The Queen* (5); *Cushing v. Dupuy* (6). The statute is not within the powers conferred by sect. 92, sub-s. 2, for the following reasons:—

First, the taxation sought to be imposed by the statute is not within the Province. The bank was incorporated by the Act of the Parliament of Canada prior to the British North America Act, namely, by 18 Vict., c. 205, whereby it was provided that the head office of the bank should be at Toronto, in the Province of Ontario: see subsequent statutes affecting the bank, 20 Vict., c. 160; 31 Vict., c. 11; 33 Vict., c. 11; 34 Vict., c. 5. It is admitted that

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(1) 3 App. Cas. 1090; *ante*, vol. 1, p. 117.

(2) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

(3) 7 App. Cas. 136; *ante*, vol. 1, p. 361.

(4) 7 App. Cas. 829; *ante*, vol. 2, p. 12.

(5) 9 App. Cas. 177; *ante*, vol. 3, p. 144.

(6) 5 App. Cas. 409; *ante*, vol. 1, p. 252.

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far the greater portion of the capital belongs to persons not residing in the Province of Quebec. The Provincial Legislature can only have jurisdiction to impose taxes on property situated within the Province, or on persons residing within the Province. No other sense can be given to the words "within the Province." The cases decided on the Income Tax Acts shew that the corporation in the present case cannot be considered as "within the Province:" *Sulley v. Attorney-General* (1); *Attorney-General v. Alexander* (2); *Cesena Sulphur Co. v. Nicholson* (3); *Gilbertson v. Fergusson* (4).

Second, the tax is not a "direct tax" within the meaning of sect. 92, sub-s. 2. The question is, what did the Legislature in 1867 mean by a direct tax. The tax imposed must be shewn to be a direct tax, and not either [578] an indirect tax, or a tax falling under neither class: see Mill's Political Economy, book v., ch. 5. The tax is a tax on the right or privilege of carrying on the business of banking in the Province, and being a tax on a particular business as such must ultimately be paid by the customers of the bank: see Mill's Political Economy, book v., ch. 3; Smith's Wealth of Nations, book v., ch. 2; Fawcett's Manual of Political Economy, book iv., ch. 3; Littré, Dict. s. v. Contributions. This is the test adopted in *Attorney-General for Quebec v. Queen Insurance Company* (5); *Attorney-General for Quebec v. Reed* (6). One of the principal characteristics of a direct tax is its generality—falling on all persons alike. It is

(1) 5 H. & N. 711; S. C. 29 L. J. (Ex.) 464.

(2) Law Rep. 10 Ex. 20.

(3) 1 Ex. D. 428.

(4) 5 Ex. D. 57; S. C. 7 Q. B. D. 562.

(5) 3 App. Cas. 1090; *ante*, vol. 1, p. 117.

(6) 10 App. Cas. 141; *ante*, vol. 3, p. 190.

in this sense that the term is used in the American Constitution : see *Hylton v. United States* (1); *Veazie Bank v. Fenno* (2). Further, the provisions of the British North America Act shew that it was not intended to include a tax of this kind in the class of direct taxes. It is in the nature of a license tax, as mentioned in sect. 92, sub-s. 9, taxes of that kind not being classed by the Legislature as direct taxes : see, too, *Severn v. The Queen* (3), where the judges held unanimously that a license tax was not a direct tax. The examination of the provisions of the British North America Act and of other English statutes contained in the judgment of Dorion, C. J., in the Court below, shews that the tax would, according to the views of the English Legislature, be regarded as a license or excise tax, at all events for the purpose of collection, and that it was not intended to include any such taxes in the term "direct taxation" in sect. 92, sub-s. 2.

Lastly, the subject matter of the statute falls clearly within sect. 91, and therefore even if within the words of sect. 92, the powers of the Dominion are to prevail over the powers of the Province.

By sect. 91, sub-section 2 the regulation of trade and commerce; sub-section 3, the raising of money by any mode or system of taxation; sub-section 14, currency and coinage; sub-section 15, banking, and incorporation of banks; sub-section 19, interest; sub-section 20, legal tender, are reserved for the exclusive jurisdiction of the [579] Dominion Legislature. The Dominion has exercised these powers by incorporating and regulating banks, providing for the amount of the debts which they may incur, the amount of reserve which they must hold in

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(1) 3 Dallas, 171.

(2) 8 Wallace, 584.

(3) 2 Can. S. C. R. 70 ;

ante, vol. 1, p. 414.

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Dominion notes, and for the circulation of Dominion notes: see Statutes of Canada, 18 Vict. c. 205; 34 Vict. c. 5, sections 14, 15, 16; 49 Vict. c. 6. It is submitted that it is impossible for the Dominion Legislature to exercise these powers, if banks as such, are subject to taxation by the Provincial Legislatures. "The power to tax involves the power to destroy:" see *McCulloch v. Maryland* (1); *Osborn v. United States Bank* (2); *Railroad Co. v. Peniston* (3); Kent's Commentaries (by Holmes), vol. i., p. 426.

*Cohen*, Q.C., and *Blake*, Q.C., were subsequently heard for the appellants in the other cases, in compliance with the above intimation from their Lordships.

The counsel for the respondent were not called upon.

The judgment of their Lordships was delivered by LORD HOBHOUSE:—

These appeals raise one of the many difficult questions which have come up for judicial decision under those provisions of the British North America Act, 1867, which apportion legislative powers between the Parliament of the Dominion, and the Legislatures of the Provinces. It is undoubtedly a case of great constitutional importance, as the appellants' counsel have earnestly impressed upon their Lordships. But questions of this class have been left for the decision of the ordinary Courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes. A number of incorporated companies are resisting payment of a tax imposed by the Legislature of Quebec, and four of them are the present appellants. It will be convenient first, to deal with the case of the Bank of Toronto, which was argued first.

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(1) 4 Wheaton, 316.

(2) 9 Wheaton, 738.

(3) 18 Wallace, 5.

In the year 1882, the Quebec Legislature passed a [580] statute entitled, "An Act to impose certain direct taxes on certain commercial corporations." It is thereby enacted that every bank carrying on the business of banking in this Province; every insurance company accepting risks and transacting the business of insurance in this Province; every incorporated company carrying on any labour, trade, or business in this Province; and a number of other specified companies, shall annually pay the several taxes thereby imposed upon them. In the case of banks, the tax imposed is a sum varying with the paid-up capital, and an additional sum for each office or place of business.

The appellant bank was incorporated in the year 1855 by an Act of the then Parliament of Canada. Its principal place of business is at Toronto, but it has an agency at Montreal. The capital is said to be kept at Toronto from whence are transmitted the funds necessary to carry on the business at Montreal. The amount of its capital at present belonging to persons resident in the Province of Quebec, and the amount disposable for the Montreal agency, are respectively much less than the amount belonging to other persons and the amount disposable elsewhere.

The bank resists payment of the tax in question, on the ground that the Quebec Legislature had no power to pass the statute which imposes it. Mr. Justice Rainville, sitting in the Superior Court took that view, and dismissed an action brought by the Government officer, who is the respondent. The Court of Queen's Bench, by a majority of three judges to two, took the contrary view, and gave the plaintiff a decree. The case comes here on appeal from that decree of the Court of Queen's Bench.

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The principal grounds on which the Superior Court rested its judgment, were as follows :—That the tax is an indirect one ; that it is not imposed within the limits of the Province ; that the Parliament has exclusive power to regulate banks ; that the Provincial Legislature can tax only that which exists by their authority, or is introduced by their permission ; and that if the power to tax such banks as this exists, they may be crushed out by it, and so, the power of the parliament to create them may be nullified. The grounds stated in the decree of the Queen's Bench are two, viz., that the tax is a direct tax, [581]and that it is also a matter of a merely local or private nature in the Province, and so falls within class 16 of the matters of Provincial legislation. It has not been contended at the bar that the Provincial Legislature can tax only that which exists on their authority or permission. And when the appellants' counsel were proceeding to argue that the tax did not fall within class 16, their Lordships intimated that they would prefer to hear first what could be said in favour of the opposite view. All the other grounds have been argued very fully, and their Lordships must add very ably, at the bar.

To ascertain whether or no the tax is lawfully imposed, it will be best to follow the method of inquiry adopted in other cases. First, does it fall within the description of taxation allowed by class 2 of sect. 92 of the Federation Act, viz., "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes?" Secondly, if it does, are we compelled by anything in sect. 91 or in the other parts of the Act, so to cut down the full meaning of the words of sect. 92 that they shall not cover this tax ?

First, is the tax a direct tax ? For the argument of

this question, the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words "direct," and "indirect," according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers, or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every [582]direct tax, that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But, that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation, valid or invalid, according to its actual results in particular cases. It must have contemplated some tangible dividing line, referable to, and ascertainable by the general tendencies of the tax, and the common understanding of men as to those tendencies.

After some consideration, Mr. Kerr, chose the definition

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of John Stuart Mill, as the one he would prefer to abide by. That definition is as follows:—

“Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person, in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.

“The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.”

It is said that Mill adds a term—that to be strictly direct, a tax must be general; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the Legislature.

Their Lordships then take Mill's definition above quoted, as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an

eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them, to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

Now, whether the probabilities of the case or the frame of the Quebec Act are considered, it appears to their Lordships that the Quebec Legislature must have intended and desired that the very corporations from whom the tax is demanded should pay and finally bear it. It is carefully designed for that purpose. It is not like a customs duty, which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid, by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intend it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank, apparently for the reasonable purpose of getting contributions for provincial purposes from those who are making profits by provincial business. It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a

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way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government. For these reasons their Lordships hold the tax to be direct taxation within class 2 of sect. 92 of the Federation Act.

There is nothing in the previous decisions on the question of direct taxation which is adverse to this view. In the case of *Queen Insurance Co.* (1) the disputed tax was imposed under cover of a license to be taken out by insurers. But nothing was to be paid directly on the license, nor was any penalty imposed upon failure to take one. The price of the license was to be a percentage on the premiums received for insurances, each of which was to be stamped accordingly. Such a tax would fall within any definition of indirect taxation, and the form given to it was apparently with the view of bringing it under class 9 of sect. 92 which relates to licenses. In *Reed's Case* (2) the tax was a stamp duty on exhibits produced in courts of law, which in a great many, perhaps most, instances would certainly not be paid by the person first chargeable with it. In *Severn's Case* (3) the tax in question was one for licenses which by a law of the Legislature of Ontario were required to be taken for dealing in liquors. The Supreme Court held the law to be *ultra vires*, mainly on the grounds that such licenses did not fall within class 9 of sect. 92, and that they were in conflict with the powers of Parliament under class 2 of sect. 91. It is true that all the

(1) 3 App. Cas. 1090 ; *ante*, vol. 1, p. 117.

(2) 10 App. Cas. 141 ; *ante*, vol. 3, p. 190.

(3) 2 Can. S. C. R. 70 ; *ante*, vol. 1, p. 414.

judges expressed opinions that the tax being a license duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question is not either in substance or in form a license duty, further examination of that point is unnecessary.

The next question is whether the tax is taxation within the Province. It is urged that the bank is a Toronto corporation, having its domicil there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2 of sect. 92 does not require that the persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the Province may legally be taxed there if taxed directly. This bank is found to be carrying on business there, and on that ground alone it is taxed. There is no attempt to tax the capital of the bank, any more than its profits. The bank itself is directly ordered to pay a sum of money; but the Legislature has not chosen to tax every bank, small or large, alike, nor to leave the [585] amount of tax to be ascertained by variable accounts or any uncertain standard. It has adopted its own measure, either of that which it is just the banks should pay, or of that which they have means to pay, and these things it ascertains by reference to facts which can be verified without doubt or delay. The banks are to pay so much, not according to their capital, but according to their paid-up capital, and so much on their places of business. Whether this method of assessing a tax is sound or unsound, wise or unwise, is a point on which their Lordships have no opinion, and are not called on to form one, for as it does not carry the taxation out of the

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Province it is for the Legislature and not for Courts of Law to judge of its expediency.

Then is there anything in sect. 91 which operates to restrict the meaning above ascribed to sect. 92? Class 3 certainly is in literal conflict with it. It is impossible to give exclusively to the Dominion the whole subject of raising money by any mode of taxation, and at the same time to give to the Provincial Legislatures, exclusively or at all, the power of direct taxation for provincial or any other purposes. This very conflict between the two sections was noticed by way of illustration in the case of *Parsons* (1). Their Lordships there said (2): "So 'the raising of money by any mode or system of taxation' is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include 'direct taxation within the Province, in order to the raising of a revenue for provincial purposes,' assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one." Their Lordships adhere to that view and hold that, as regards direct taxation within the Province to raise revenue for provincial purposes, that subject falls wholly within the jurisdiction of the provincial legislatures.

It has been earnestly contended that the taxation of banks would unduly cut down the powers of the parliament in relation to matters falling within class 2, viz., the regulation of trade and commerce; and within class 15, viz., banking and the incorporation of banks. Their [586] Lordships think that this contention gives far too

(1) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

(2) 7 App. Cas. p. 108; *ante*, vol. 1, p. 272.

wide an extent to the classes in question. They cannot see how the power of making banks contribute to the public objects of the provinces where they carry on business can interfere at all with the power of making laws on the subject of banking, or with the power of incorporating banks. The words "regulation of trade and commerce," are indeed very wide, and in *Severn's Case* (1) it was the view of the Supreme Court that they operated to invalidate the license duty which was there in question. But since that case was decided, the question has been more completely sifted before the Committee in *Parson's Case* (2), and it was found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures. It was there thrown out that the power of regulation given to the parliament meant some general or inter-provincial regulations. No further attempt to define the subject need now be made, because their Lordships are clear that if they were to hold that this power of regulation prohibited any provincial taxation on the persons or things regulated, so far from restricting the expressions, as was found necessary in *Parson's Case* (2), they would be straining them to their widest conceivable extent.

Then it is suggested that the legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would

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(1) 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.

(2) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

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be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But whatever power falls within the legitimate meaning of classes 2 and 9, is, in their Lordships' judgment, what the Imperial Parliament intended to give; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties in the construction of the Federation Act.

[587] Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. Under that constitution, as their Lordships understand, each state may make laws for itself, uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the state legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sect. 92, which may by possibility, and if exercised in some extravagant way interfere with the objects of the Dominion in exercising their powers under sect. 91. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express

words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within sect. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament.

It only remains to refer to some of the grounds taken by the learned judges of the lower Courts which have been strongly objected to at the Bar. Great importance has been attached to French authorities who lay down that the *impôt des patentes*, which is a tax on trades, and which may possibly have afforded hints for the Quebec law, is a direct tax. And it has been suggested that the provincial legislatures possess [588] powers of legislation either inherent in them or dating from a time anterior to the Federation Act, and not taken away by that Act. Their Lordships have not thought it necessary to call on the respondent's counsel, and, therefore, possibly have not heard all that may be said in support of such views. But the judgments below are so carefully reasoned, and the citation and discussion of them here has been so full and elaborate, that their Lordships feel justified in expressing their present dissent on these points. They cannot think that the French authorities are useful for anything but illustration, and they adhere to the view which has always been

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taken by this Committee, that the Federation Act exhausts the whole range of legislative power, and that whatever is not thereby given to the provincial legislatures rests with the parliament.

The result is that, though not wholly for the same reasons, their Lordships agree with the court of Queen's Bench; and they will humbly advise Her Majesty to affirm their decree, and to dismiss the appeal of the Bank of Toronto.

The other three cases possess no points of distinction in favour of the appellants. That of the Canadian Bank of Commerce is exactly parallel. The Merchants' Bank of Canada has its principal place of business in Montreal, and to that extent loses the benefit of one of the arguments urged in favour of the other banks. The insurance company is taxed in a sum specified by the Quebec Act, and not with reference to its capital, and so loses the benefit of one of the arguments urged in favour of the banks. The cases have been treated as substantially identical in the Courts below, and their Lordships will take the same course with respect to all of them.

The appellants in each case must pay the costs of the appeal.

JUDGMENTS IN QUEBEC COURT OF QUEEN'S BENCH.

[Reported Montreal Law Rep., 1 Queen's Bench, 122.]

DORION, C. J. :—

Nine cases have been submitted to us in order to test the legality of taxes imposed by an Act passed by the Legislature of the Province of Quebec, in the 45th year of Her Majesty's reign, under cap. 22, and entitled "An Act to impose certain direct taxes on certain commercial corporations."

The first section of this Act which imposes the taxes claimed by these several actions, is in the following terms :—

1. "In order to provide for the exigencies of the public service of this Province, every bank carrying on the business of banking in

this Province, every insurance company accepting risks and transacting the business of insurance in this Province, every incorporated company carrying on any labour, trade or business in this Province, every incorporated loan company making loans in this Province, [124] every incorporated navigation company running a regular line of steamers, steamboats or other vessels in the waters of this Province, every telegraph company working a telegraph line or part of a telegraph line in this Province, every telephone company working a telephone line in this Province, every city passenger railway or tramway company working a line of railway or tramway in this Province, and every railway company working a railway or part of a railway in this Province, shall annually pay the several taxes mentioned and specified in section three of this Act, which taxes are hereby imposed upon each of such commercial corporations respectively."

Section 3 says : The annual taxes imposed upon and payable by the commercial corporations mentioned in section 1 shall be, on banks . . . \$1,000 when the paid-up capital is from \$500,000 to \$1,000,000, and an additional sum of \$200 for each million or fraction of a million dollars of the paid-up capital from one million to three million dollars, and a further additional sum of \$100 for each million or fraction of a million dollars of the paid-up capital over three million dollars, and an additional tax of \$100 upon each office in the cities of Montreal and Quebec, and \$20 for each office in any other place.

By the subsequent provisions of this Act, these taxes are payable annually, and the recovery can be made on behalf of Her Majesty, and by sect. 10 these taxes are to form part of the consolidated revenue of the Province.

Of the nine cases under consideration, which have all been instituted by the revenue inspector for the district of Montreal, five are against banks, and the others against an insurance company, a manufacturing company, a railway and navigation company, and the ninth against a navigation company. Of these, six were incorporated either by the Dominion Parliament or before the passing of the B. N. A. Act, 1867 ; one was incorporated in England, and two in the United States. Three have their principal offices in the Province of Quebec, and the others have their principal offices out of the Province, but they are all doing business in the Province of Quebec. The stock in three of the companies is held by parties residing out of the Province, and in the others by parties a portion of whom reside in the Province, while the other portion reside out of the Province.

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In the five bank cases the actions have been dismissed by Mr. Justice Rainville, and in the four others they have been maintained by Mr. Justice Jetté and Mr. Justice Mathieu.

These nine cases form part of a larger number of cases now pending against other corporations for the recovery of similar taxes, and have been represented at the hearing as indicating the different classes into which the whole of the cases may be divided according to the special circumstances of each case.

I may at once say that I do not find that these special circumstances are such as to take any of the cases out of the rule which I think is applicable to all of them.

The question, and the only question, to be decided, as stated in the admissions given in several of these cases, is, whether or not the Provincial Legislature had authority to pass the Act, 45 Vict., c. 22, and to impose the taxes sought to be recovered.

Mr. Justice Rainville, relying principally on arguments drawn from the decisions rendered in the United States, has ruled in the five bank cases, that the present tax was not a direct tax within the meaning of the B. N. A. Act, 1867, that the Provincial Legislature had no authority to impose such a tax, and as a consequence he has dismissed the five actions.

Mr. Justice Jetté and Mr. Justice Mathieu, rejecting the authority of American decisions, as inapplicable to the present cases, inasmuch as the words "*direct taxes*" in the American constitution are controlled and limited in their application by the obligation imposed upon Congress to apportion such "*direct taxes*" in proportion to the census, and relying principally on the opinions expressed by French writers on political economy, have come to an opposite conclusion and declared that the legislature in imposing the present tax had acted within the limits of its authority.

Now, without rejecting altogether the assistance which may be [126] derived from a careful examination of the decisions rendered on this question of direct taxation by the eminent jurists who, sitting in the Supreme Court of the United States, have had to give an interpretation to those words, as found in the Constitution of their country, nor the valuable opinions expressed by political economists as to the meaning of those words, I do not think that either of those standards is a satisfactory one in the present cases. It cannot be denied that the words "*direct taxes*," in the Constitution of the United States, cannot apply to some of the taxes which are elsewhere considered as direct taxes, and that they were therefore used in a limited sense in the Constitution of the United States.

Chief Justice Chase, in the case of *Veazie Bank v. Fenno*, (1) after a careful review of the judicial decisions and of the opinions of jurists and others, came to the following conclusions :—

“It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on *land* and appurtenances, and taxes on polls or capitation taxes.”

And the same learned judge further says (p. 546) :—

“It may be safely assumed, therefore, as the unanimous judgment of the Court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several states.”

Judge Cooley, on Taxation, p. 5, note 2, also says :—

“The term ‘direct taxes’ is employed in a peculiar sense in the federal constitution, in the provision requiring such taxes to be apportioned according to representation, and they are, perhaps, limited to capitation and land taxes ;” and Kent, vol. 1, p. 255, [127] says : “The Constitution contemplated no taxes as direct taxes, but such as Congress could lay in proportion to the Census.”

On the other hand, there is a great diversity of opinion among jurists and writers on political economy, not only as to what taxes are to be considered as direct taxes, but even as to the definition of what constitutes a direct tax.

Merlin, *Répertoire*, vo. Contributions Publiques, sec. 1, says :

“Les contributions indirectes sont suivant la définition qu’en donne la loi, en forme d’instruction du 8 janvier 1790, tous les impôts assis sur la fabrication, la vente, le transport et l’introduction de plusieurs objets de commerce et de consommation, impôts dont le produit ordinairement avancé par le fabricant, le marchand ou le voiturier est supporté et indirectement payé par le consommateur.”

“D’après cette définition les droits d’enregistrement (the droits d’enregistrement include and are chiefly composed of the duties levied on the conveyance of real estate whether by inheritance or otherwise) ne devraient pas être considérés comme des impositions indirectes, cependant on s’est habitué à les ranger dans cette classe.”

“C’est aussi à cette classe qu’appartiennent les droits de douane, les droits sur le tabac, sur les cartes à jouer, sur le sel, sur les boissons, etc.”

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“ Say, *Traité d'Economie Politique*, p. 521, has the following passage :—“ On peut ranger sous deux chefs principaux les différentes manières qu'on emploie pour atteindre les revenus des contribuables. Ou bien on leur demande directement une portion du revenu qu'on leur suppose : c'est l'objet des contributions directes ; ou bien on leur fait payer une somme quelconque sur certaines consommations qu'ils font avec leur revenue ; c'est l'objet de ce que l'on nomme en France les contributions indirectes.”

This writer places among the direct taxes, “ *la contribution foncière, la contribution mobilière et les patentes*,” and among the contributions indirectes, “ les droits de douane, l'octroi, les billets de spectacles, le timbre des journaux, les droits sur la vente du tabac, le transport des lettres par la poste, le timbre,” etc., and he says : [128] “ Toutes ces manières de lever les contributions les rangent dans la classe des contributions indirectes, parce que la demande n'en est pas faite à personne directement, mais au produit, à la marchandise frappée de l'impôt,” and in a note he adds : Et non parcequ'elles atteignent indirectement le contribuable ; car si elles tiraient leur dénomination de cette dernière circonstance, il faudrait donner le même nom à des contributions très directes, comme par exemple à l'impôt des patentes qui tombe en partie indirectement sur le consommateur des produits dont s'occupe la patente.”

“ La patente, says de Gerando, *Droit Administratif*, vol. 4, p. 42, confère le droit d'exercer librement une branche d'industrie.” (*Loi des 2-17 mars 1791.*)

At page 129, the same writer says : “ La licence a quelque analogie avec la patente, elle s'applique à la profession exercée.

“ Elle correspond à la déclaration de celui qui l'exerce ; elle la constate.

“ La déclaration a pour objet de faire connaître à l'administration ceux qui exercent une profession spécialement soumise à la surveillance.

“ Elle est exigée des débitants de boissons, des marchands en gros, des brasseurs, distillateurs et bouilleurs de profession.”

This writer places the *droits de patentes* among the *contributions directes* and the *droits de licences* among the *contributions indirectes*. (pp. 5 and 42 and pp. 100 and 129.)

Leroy-Beaulieu, *Traité de la Science des Finances*, vol. 1, p. 214, after showing that the definition of direct and indirect taxes is not the same in every country, says :

“ Par l'impôt direct le législateur se propose d'atteindre immédiatement du premier bond et proportionnellement à sa fortune ou à

ses revenus, le véritable contribuable ; il supprime tout intermédiaire entre lui et le fisc, et il cherche une proportionnalité rigoureuse de l'impôt à la fortune ou aux facultés.

“ Par l'*impôt indirect* le législateur ne vise pas immédiatement le véritable contribuable et ne cherche pas à lui imposer une charge [129] strictement proportionnelle à ses facultés : il ne se propose d'atteindre le vrai contribuable que par ricochet, par contre-coup, par répercussion : il met des intermédiaires entre lui et le fisc, et renonce à une stricte proportionnalité de l'impôt dans les cas particuliers, se contentant d'une proportionnalité relative en général.”

Passy, in the Dictionnaire de l'Economie Politique, vo. impôt, says :

“ C'est un usage reçu de diviser les impôts en deux catégories distinctes. On appelle *directs* ceux que les contribuables acquittent eux-mêmes pour leur propre compte ; on appelle *indirects* ceux dont certains d'entre eux ne font que l'avance et dont ils obtiennent le remboursement des mains d'autres personnes.”

The test applied by these two writers to distinguish direct from indirect taxes is inconsistent with the definition given by Say. It is, however, substantially the same as that indicated by Merlin as derived from the law of the 8th of January, 1790, and by Mill, *Principles of Political Economy*, lib. 5, ch. 3. § 1, who says :—

“ Taxes are either *direct* or *indirect*. A *direct tax* is one which is demanded from the very persons who it is intended or desired should pay it. *Indirect taxes* are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another : such as the *excise* or *customs*.”

And Walker—*Science of Wealth*, p. 338 :—

“ A *direct tax* is demanded of the person who it is intended shall pay it. *Indirect taxes* are demanded from one person in the expectation that he will indemnify himself at the expense of others.”

According to McCulloch, *Principles of Taxation*, p. 1 :—

“ A tax may be either direct or indirect. It is said to be direct when taken directly from property or income, and indirect when it is taken from them by making individuals pay for liberty to use certain articles or to exercise certain privileges.”

Under this last definition the revenue raised by means of the licenses [130] mentioned in sub-sect. 9 of sect. 92, of the Confederation Act, would in England be considered as the outcome of an indirect tax, while in France it might be considered as a patent tax, which is a direct tax, or a license tax, which is an indirect tax.

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Mill, in the work already cited, ch. 5, § 1, says :—

“ Besides direct taxes on income, and taxes on consumption, the financial systems of most countries comprise a variety of miscellaneous imposts not strictly included in either class.”

I do not wish to discuss here the comparative merits of these definitions and classifications. My only object in making the above citations is to show that the expressions “*direct*” and “*indirect taxes*,” in their legislative application, are purely conventional terms, having a different meaning according to the different legislation of each country in which they are used, and that as legal terms they have no common or scientific basis.

This could hardly be otherwise, since in every country new taxes or new modes of taxation, unknown in other countries, are constantly brought into operation, and old or effete taxes are revived under new names and a new classification, so that it is almost impossible for foreign writers to follow the changes.

The old aides or gabelles which existed in France before the Revolution, and were abolished by the Assemblée Constituante, became under the First Empire the “*droits réunis*.” The “*droits réunis*” disappeared with the Empire ; the taxes, however, were retained at the Restoration, under the less obnoxious name of contributions indirectes.

In England, some of the stamp duties, and even some of the taxes formerly known as assessed taxes, have by recent statutes been declared to be excise duties.

Stephen, Commentaries, vol. 2, p. 603, (6th ed.) speaking of excise, says that, in England, “ Its advantages, indeed, are such that under recent Acts of Parliament some imposts have been classed (probably for greater convenience in collection) under this head of duties, though not in the nature of excise. This is the case with regard to the licenses which the law requires to be annually [131] taken out by those who manufacture or deal in certain articles, or who follow certain businesses.”

This is very much the same language used by Merlin as regards the droits d'enregistrement, when he says they ought not to be considered as impositions indirectes, cependant on s'est habitué à les ranger dans cette classe. If such a change can be done by usage or custom, surely it can be effected by express legislation.

In the case of *Springer v. United States* (1) the following passage of a brief prepared for the case of *Hylton v. The United States* (2) by Hamilton, the distinguished statesman and jurist, is cited :—

(1) 102 U. S. Rep., 586, 597.

(2) 3 Dallas, 171.

“What is the distinction between *direct* and *indirect taxes*? It is a matter of regret that terms so uncertain and vague, in so important a point, are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point.”

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And in the case of *Veazie Bank v. Fenno* (1), to which I have already referred, Chief Justice Chase is reported to have said: “Much diversity of opinion has always prevailed upon the question what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations.”

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All this shows the difficulty of applying in every country the same test of description to the words *direct* or *indirect taxes*; and I think that the remarks of Chief Justice Chase are as applicable to the B. N. A. Act as to the Constitution of the United States. We must therefore look elsewhere for a satisfactory interpretation of the legal meaning of the words *direct taxation* as used in the B. N. A. Act. [132] We must first exhaust the ordinary rules of interpretation applicable to statute law, and seek in the Act itself and in the different provisions relating to the power of taxation what meaning the Imperial Parliament has attached to those words. We must also refer to the other Acts passed by Parliament on the same or cognate subjects, to find how similar taxes have been classified, and finally we must consider what effect the decisions already rendered by our highest Courts and by the Lords of the Privy Council on the several questions of taxation, which have come before them, have on the present cases. Should these enquiries fail to satisfy us, then we may have recourse to those more remote and I may add less satisfactory sources of information, the United States decisions and the opinions of political economists, not as authority, but as arguments and reasons emanating from eminent jurists and scientific men, whose views on such questions are, undoubtedly, deserving of great consideration.

By referring to the B. N. A. Act, we find that the third sub-sect. of sect. 91, gives to the Dominion Parliament the exclusive legislative authority for the raising of money by any mode or system of taxation. Section 102 provides that all duties and revenues over which the respective legislatures of the several provinces, at the time of

(1) 8 Wallace, 533, 541.

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the Union, had power of appropriation, except such as are reserved to the respective legislatures, or are raised by them in accordance with the special powers conferred on them by the Act, shall form one consolidated revenue fund to be appropriated for the public service of Canada, etc.

By sect. 121, all articles of the growth, produce or manufacture of any of the Provinces are to be admitted free into the other Provinces.

Sect. 122 places the customs and excise laws in force in each Province under the control of the Dominion Parliament, by providing, that "*The customs and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.*"

[133] By sect. 123 interprovincial customs duties are abolished and sect. 124 reserves to the Province of New Brunswick the right to levy certain existing export duties on lumber. but forbids their increase ; and finally, it is provided by sect. 126, that those portions of duties and revenues reserved to the respective governments or legislatures of the Provinces, and *the duties raised by them in accordance with the special powers conferred upon them by the Act, shall in each Province form the consolidated revenue fund of the Province.*

From these several provisions it is clear that the whole of the duties and revenue of which, before the Union, each of the Provinces could dispose, including *customs and excise duties*, have been transferred to the Dominion, together with the exclusive power to alter them and to raise money by any mode or system of taxation ; except as regards such portions of those duties and revenues which are reserved to the Provinces, and such other duties *as they may raise under the special powers conferred on them.*

The Provinces have therefore no power to deal with or to impose customs or excise duties, nor to raise any revenue whatsoever by taxation unless the power and authority to do so has been specially conferred upon them by some other portion of the Act, and only to the extent to which such power has been conferred.

Now, there are only two provisions of the Act, by which the provincial legislatures are authorized to raise a revenue by taxation. They are contained in sub-sect. 2, and sub-sect. 9, of sect. 92, and they are in these terms :—

Sub-sect. 2. "*Direct taxation within the Province in order to the raising of a revenue for provincial purposes.*"

Sub-sect. 9. "Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

These two sub-sections are mere exceptions to the exclusive power of taxation conferred on the Dominion Parliament by sect. [131] 91, sub-sect. 3, and must be read in connection with the last sub-section, as if it was in the following terms, viz. :

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act), the exclusive legislative authority of the Parliament of Canada extends (3) to the raising of money by any mode or system of taxation, with the exception that each Provincial Legislature may exclusively make laws in relation to direct taxation within the Province, in order to the raising of a revenue for provincial purposes, and (9) in relation to shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

There is no authority here conferred on the provincial legislatures to raise a revenue by indirect taxation, nor by customs or excise duties, except in so far as shop, saloon, tavern, auctioneer and other licenses, may be considered as excise duties, all others being excluded by the exclusive power of taxation conferred on the Dominion Parliament by sub-sect. 3, of sect. 91 and by sects. 102, 121, 122, 123, 124 and 126 already mentioned.

This is made very clear by the resolutions which were submitted to the Legislature of the Province of Canada as the basis of the Confederation Act. Resolution 29 (Debates on Confederation, p. 3), (1) proposed that : "The General Parliament shall have power to make laws for the peace, welfare, etc., and especially laws respecting :

"3. The imposition or regulation of duties of Customs on Imports and Exports—except on exports of timber, etc., from New Brunswick and of coal and other minerals from Nova Scotia.

"4. The imposition or regulation of Excise Duties.

[135] "5. The raising of money by all or any other modes or systems of Taxation."

(1) *ante*, vol. 2, p. 691.

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In the Confederation Act, the articles 3 and 4 of the 29th resolution were dropped, except as to export duties on lumber in New Brunswick and on coal in Nova Scotia, which were provided for in another form by sects. 109 and 124 of the Act, and article 5, which became sub-sect. 3 of the 91st sect., was modified by striking out the words "all or any other modes or systems of taxation," and substituting therefor the words "by any mode or system of taxation," so as to include the duties of customs and of excise mentioned in the third and fourth articles; and to avoid doubts as to the respective powers of the Dominion Parliament and of the Provincial Legislatures, the word "exclusively," was added in the first part of sect. 91 so as to give to the Dominion Parliament the exclusive power to legislate on customs and excise duties, as well as on the other subjects mentioned in this section. Then the other sections already cited, namely, 102 and 126, specially provide that the local governments shall have no other sources of revenue except those expressly reserved, and those which they are authorized to raise in accordance with the special powers conferred upon them by the Act; so that, apart from the exclusive authority given to the Dominion Parliament to raise a revenue by all modes of taxation, we have the repeated declarations contained in sects. 102 and 126, that the provinces shall have no right to impose any duties or taxes except under the special powers given to them by the Act.

I find no difficulty in reconciling the exclusive power given to the Dominion with the exclusive power attributed to the Provincial Legislatures as regards taxation. The Dominion Parliament has the exclusive power to raise a revenue by all modes of taxation for Dominion purposes, and the Provincial Legislatures have exclusive authority to raise a revenue by direct taxation for Provincial purposes. That is, the Dominion alone, to the exclusion of the Provincial Legislatures, is authorized to raise a revenue for [136] Dominion or general purposes, and the Provincial Legislatures, to the exclusion of the Dominion Parliament, are authorized to raise a revenue by direct taxation for their respective provinces. In other words, the Dominion Parliament cannot interfere with the taxation for Provincial purposes, nor the local legislatures with the taxation for Dominion purposes.

It has been contended that, as by sub-sect. 16 of sect. 92 the local legislatures were authorized to legislate on all matters of a purely local or private nature in the provinces, they were therefore authorized to raise a revenue for provincial purposes by all modes of taxation, including direct and indirect, as well as by customs and excise duties. The answer to this contention is obvious.

One of the most elementary rules of interpretation of Statutes is that general provisions in an Act of Parliament do not control nor affect the special enactments which it contains and therefore the general authority conferred by sub-section 16 as to matters of a purely local or private nature in the province can only apply to such other matters as are not specially provided for by the Act, and as the subject of provincial taxation is specially provided for by sub-sects. 2 and 9 of sect. 92, sub-sect. 16 does not apply to the subject of taxation. (Dwarris, p. 765.)

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If sub-sect. 16 was not limited by the preceding sub-sects. 2 and 9, these sub-sections would have been quite unnecessary, since sub sect. 16, by the generality of its terms, would have covered all subjects over which the Provincial Legislatures could have exercised their legislative authority.

The historical evidence derived from the discussions which took place in the parliament of Canada on the confederation resolutions shows that it was never intended that the local legislatures should have the unlimited power to impose all kinds of taxes.

Sir Alexander Galt, then Finance Minister, in explaining the financial aspect of the proposed confederation, said : (Parliamentary Debates on Confederation, p. 68) "If nevertheless the local revenues [137] become inadequate, it will be necessary for the local governments to have recourse to *direct taxation*, and I do not hesitate to say that one of the wisest provisions in the proposed constitution, and that which affords the surest guarantee that the people will take a healthy interest in their own affairs and see that no extravagance is committed by those placed in power over them, is to be found in the fact that those who are called upon to administer public affairs will feel when they resort to direct taxation, that a solemn responsibility rests upon them, and that that responsibility will be exacted by the people in the most peremptory manner. If the men in power find that they are required, by means of *direct taxation*, to procure the funds necessary to administer the local affairs for which abundant provision is made in the scheme, they will pause before they enter upon any career of extravagance. Indeed I do not hesitate to say, that if the public men of these provinces were sufficiently educated to understand their own interests in the true light of the principles of political economy, it would be found better now to substitute *direct taxation* for some of the indirect modes by which taxation has been imposed upon the industry of the people. I do not however believe that at this moment it is possible, nor do I think the people of this country

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would support any government in adopting this measure, unless it were forced upon them by the pressure of an overwhelming necessity."

And further. (p. 69,) Mr. Galt added :

"In transferring to the general government all the large sources of revenue and in placing in their hand, with a single exception, that of *direct taxation*, all the means whereby the industry of the people may be made to contribute to the wants of the state, etc."

The tax Mr. Galt was speaking of and which he thought *could only be forced on the people by the pressure of an overwhelming necessity*, was neither a customs nor an excise duty, both of which the people of Canada had long been accustomed to pay, but the direct tax which is assessed by the tax gatherer going to every house and [138] exacting either a capitation tax, or a proportion of each inhabitant's income or property to replenish the provincial treasury. These were the only direct taxes known in the provinces, in some of which they were raised for municipal and partially for school purposes. When Mr. Galt gave this solemn warning to the public men who would be charged under confederation with the management of the provincial affairs and spoke of this dreaded direct tax, he did not contemplate, that to convert it into the most popular tax ever imposed, it would only be necessary for the provincial legislatures to pass an Act, with the title : "An Act to raise a revenue for provincial purposes by means of a direct tax within the Province," and to enact that every British, foreign or domestic insurance corporation, every bank, every loan company, every navigation and telegraph company, whether incorporated in Canada or elsewhere, whether their stock was held in the province or not, but doing business in the province, should pay a tax calculated not on the amount of business done in the province, but on the paid-up capital or stock of each company, so as to indirectly collect the greater portion of this tax through the English, the American and other capitalists investing their money in any of the commercial enterprises mentioned in the Act.

As however the legislatures of the Provinces cannot extend their power of taxation by declaring that a tax is a direct tax, if it is not so under the B. N. A. Act, we have to examine the question raised in the present cases irrespective of the description or name given by 45 Vict., c. 22, to the tax imposed by its provisions.

It is not contended that the present tax was imposed under the authority of sub-section 9, for it is not a tax raised by means of licenses, and it is evident that the legislature intended to impose *certain direct taxes*, since it has used those very words in the title

of the Act,—yet it is necessary to ascertain what is the character of the duties which the Provinces are authorized to raise by means of the licenses mentioned in sub-section 9, in order to collect the [139] meaning which the Legislature of the late Province of Canada and the Imperial Parliament have attached to the words ‘direct taxation’ as used in the resolutions passed by that legislature and in the B. N. A. Act.

It seems evident that neither the Legislature of Canada nor the Imperial Parliament did consider that the revenues to be raised by these licenses were “direct taxes” otherwise sub-sect. 9 would have had no meaning, since “direct taxation” was already provided for by sub-sect. 2.

Now, let us see how these license duties and other similar duties were considered in England before and at the time the B. N. A. Act was passed. As far back as 1803, the Imperial Parliament passed an Act (43 Geo. III., c. 69) to repeal duties of *excise*, and to impose others to replace them. The first item of the new duties mentioned in Schedule A., under the title “*Duties of Excise*,” is a duty of six-pence on sales by auction of certain property to the amount of twenty shillings, and the second item is of another duty of ten-pence on similar sales of other classes of property. Then the same schedule headed “duties of excise” contains a description of persons who are obliged to take licenses in order to exercise certain trades or businesses, and among them are to be found, besides those for manufacturing or selling beer, ale or spirits of any kind, *every person exercising the trade or business of auctioneer*, every person trading or vending or selling *coffee, tea, cocoanut*, every person trading in, vending or selling *gold or silver plate*, every dealer or seller of *tobacco or snuff*, for which licenses they have to pay a license fee varying in amount according to the kind or amount of business done.

The necessities of state during the great continental wars of the first quarter of the present century required constant changes in those licenses and duties, and there are several statutes in which they are described as excise licenses and excise duties.

In course of time, new taxes were imposed, and among others a [140] tax on railway companies, which is charged on the number of passengers carried. No license is required in this case. The tax is, however, placed in the list of excise duties.

In 1864, three years before the passing of the B. N. A. Act, the Imperial Parliament passed the 27th & 28th Vict., c. 56, by which it is enacted [sect. 6] that from and after the first day of July, 1864, the duties now payable by law upon or in respect of the licenses to be taken out in the United Kingdom “by persons carrying on

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the trades and businesses hereinafter mentioned as described and defined by the several statutes relating to such licenses and trades or businesses respectively, (that is to say):—Appraisers; pawn-brokers; dealers in gold and silver plate; owners, proprietors, makers and compounders of and persons uttering, vending, or exposing to sale or keeping ready for sale any medicine liable to stamp duty; hawkers and pedlers; house agents; sellers of playing cards (being makers thereof,) and sellers of playing cards (not being makers thereof,) shall respectively be denominated and be deemed to be duties of excise, and the said licenses respectively shall be granted by such officer or officers of excise and shall be in such form as the commissioners of inland revenue shall direct in that behalf."

Again, if we look at the returns made to Parliament of the different sources of revenue for the fiscal year ended on the 31st of March, 1866, the year before the Act of Confederation was passed, we find the last-mentioned duties classed among the duties collected from excise, as also the railway tax, the stage carriage tax, licenses and duties on retailers of spirits, on tea and coffee dealers, on auctioneers, and on many other classes of persons carrying on particular trades or business.

It may be true, as observed by Stephen, *loc. cit.*, that some of these imposts are not properly in the nature of excise duties if these words are used in the limited sense of duties on [articles of] consumption; but it is not the technical classification which political economists might make of these different imposts we have to ascertain; it is the legal meaning which the Imperial Parliament has attached to the duties which the Provincial Legislatures are authorized to impose by means of shop, tavern, auctioneer and other licenses [141] mentioned in sub-sect. 9, and this we find clearly indicated in the several statutes which have been passed since the beginning of the present century to regulate excise duties, and in the public documents submitted to and sanctioned by the Imperial Parliament. If these license duties in their origin were not strictly excise duties in the technical sense of those words, they are so intimately connected with them, as accessories to the raising of excise duties, that they have long since been considered as part and portion of them; and if, as Merlin tells us, the *droits d'enregistrement* in France are generally considered as indirect taxes, although they are not properly so, there is far greater reason in construing an Imperial statute to consider as excise duties what the Imperial Parliament has repeatedly declared to be so.

The licenses mentioned in sub-sect. 9 of the B. N. A. Act, are the same as some of those mentioned in the statutes and returns we have just referred to ; and in the absence of any expressions to distinguish them from the same imposts levied in England, we must hold that they are of the same character, and that by enacting the 9th sub-sect. of sect. 92, Parliament clearly indicated their intention of authorizing the Provincial Legislatures to impose by means of licenses, imposts which were different from and not included in the authority given by sub-sect. 2 to raise a revenue by direct taxation.

The next enquiry is as to whether the present taxes are of the same nature as those mentioned in sub-sect. 9.

It seems to be indifferent how a business tax is levied in England. It is sometimes by a license fee, as in the case of shop and tavern keepers, hawkers and pedlars, etc. ; sometimes partly by a license fee and partly by a percentage on the business, as in the case of auctioneers. In the case of railways, no licenses are issued, and the tax is on the number of passengers carried, that is, on the gross business of the companies, or it is on the number of miles run irrespective of the business done, as in the case of stage carriages, [142] and sometimes on the kind of carriage, the number of seats they have, or the number of horses attached, that is, on the capacity to do business irrespective of its amount, and yet the nature of the tax is not changed by these differences, and in all these cases the impost is considered as an excise duty.

Cooley, on taxation, pp. 20-21, says :—

"TAXES ON EMPLOYMENTS.—A tax on the privilege of carrying on a business or employment will commonly be imposed in the form of an excise tax on the license to pursue the employment ; and this may be a specific sum or a sum whose amount is regulated by the business done, or income, or profits earned. Sometimes small license fees are required, mainly for the purpose of regulation, but in other cases substantial taxes are demanded, because the persons upon whom they are laid would otherwise escape taxation in the main, if not entirely. Instances of hawkers, pedlars, auctioneers, etc., will readily occur to the mind. The form of a license, though not a necessary, is a convenient form for such a tax to assume, because it then becomes a condition to entering upon the business or employment, and is collected without difficulty ; but it is equally competent to impose and collect the tax by the usual methods."

Mr. Justice Cooley in the case of *Youngblood v. Sexton* (1).

(1) 32 Michigan, 406, 425.

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says :—“ Taxes upon business are usually collected in the form of license fees ; and this may possibly have led to the idea that seems to have prevailed in some quarters that a tax implied a license. But there is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed.”

This shows that the character of a tax is not altered by the fact that it is collected by means of a license fee or without a license.

In the present instance the tax imposed was mentioned as a license or a license tax in the bill when first introduced into the Legislature. During the progress of the measure the title of the bill was changed into that of an Act to impose certain *Direct Taxes* [143] on certain commercial corporations. It cannot be reasonably contended that the nature of the tax was thereby altered. The name alone was changed, but not the substance.

It is also evident, that there can be no difference whether the tax is imposed on individuals, companies or corporations. We have just seen that in England an excise duty was imposed on railway corporations, as well as on the owners of stage carriages and hackney coaches.

In the United States, where the State Legislatures are endowed with general powers to legislate on all subjects not specially delegated to Congress representing the Federal legislative authority, and where the several States are authorized to raise a revenue by means of *Excise Duties*, the question as to the nature of a tax on the business carried on by corporations has repeatedly been adjudicated upon and its proper classification determined.

In the case of the *Attorney-General v. Bay State Mining Co.*, (1) it was held that the right to exercise a corporate franchise within the State of Massachusetts was the proper subject of an *Excise Tax* which the State had a right to impose. The same thing was decided in the case of *Oliver v. Liverpool and London Life and Fire Insurance Co.* (2)

In the case of the *Commonwealth v. Hamilton Manufacturing Co.*, (3) Bigelow, C. J., said : “ It is too clear to admit of discussion that according to recent adjudications of this Court, the assessment which is the subject of controversy in these actions must be supported, if sustained at all, as an exercise by the legislature of the authority conferred by that clause of the constitution, part 2, c. 1, sect. 1, art 4, which gives the power of imposing reasonable duties

(1) 99 Mass. 148.

(2) 100 Mass. 531.

(3) 12 Allen, 298, 300.

and excises upon any commodities within the Commonwealth ; in other words it cannot be held valid unless it can be construed to be in the nature of an excise on the franchise of the corporations designated in the Statute etc."

. . . And at p 304, the learned judge adds : " These illustrations serve to show that an assessment based on the market value of the shares of a corporation, or of the aggregate of said shares, or [144] capital stock cannot be properly deemed a tax on the property of the corporation." And again at p. 306, " To our own minds, it is a sufficient and decisive answer to this argument, that, according to the views we have already expressed, the assessment in question is an excise or duty on the franchise of the corporations on which it is imposed, and was intended by the legislature to have that operation and effect only, and that it is not in any just or proper sense a tax on corporate property." See also *Portland Bank v. Apthorp*. (1)

These decisions differ from those rendered by the United States Supreme Court on the interpretation to be given to the words " direct taxes " used in the constitution of the United States, inasmuch as the Supreme Court had to consider how far direct taxation was limited by the necessity of apportionment according to census or population, while in the other cases the naked question was whether a tax on business or on what is described as a tax on the franchise when applied to a corporation was an *excise tax* or not. The affirmative decisions on this point are directly applicable to the present cases, and they show conclusively that in the United States as well as in England a tax on business or employment is considered as an excise tax. The effect of a tax on the manufacturer as in the case of the Williams Manufacturing Company, or on the carrier, as in the case of the Lumber Export Company, is just the same as if the tax was imposed on the goods manufactured in the one case or conveyed in the other ; in both cases the result is to raise the price of the commodity and to cause the tax to be paid by the consumer, or to reduce the profits of the producer, in which case the latter has to pay the whole or a portion of the duty.

That excise taxes are not direct taxes does not, it seems, admit of controversy, at least at the present time, whatever may have been the discussions on the subject at an early date of their imposition. It is admitted by every writer on political economy, whether English, French or American. And this has not been questioned either at the bar or by any of the judges who have decided the present cases.

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[145] If there could be a doubt as to whether the tax imposed by the Quebec Legislature is an indirect tax, there can be none that according to Imperial legislation and American jurisprudence (there seems to be no occasion where such a question can arise in the courts in England), it is an *excise tax*; and the Provincial Legislatures have no more authority to impose an excise tax than an indirect tax.

If we now turn to the decisions rendered on the taxing powers conferred by the B. N. A. Act, we find that in *Severn v. The Queen*, (1) all the judges admitted that a license fee of \$50 imposed upon a brewer was an *indirect tax*; at p. 94, Richards C. J., qualified it as an *excise tax*, when he said: "It is not doubted that the Dominion Legislature had a right to lay on this excise tax and to grant this license."

In the case of the *Attorney-General for Quebec v. Queen Insurance Co.*, (2) their lordships of the Privy Council held that the tax was not a direct tax and that it was therefore *ultra vires*.

I understand that the same conclusion has been arrived at by their Lordships in the case of the *Attorney-General of Quebec v. Reid*, (3) with reference to the tax recently imposed upon legal proceedings, although I have not yet seen the written judgment in that case.

It was held in those three cases that the Provincial Legislatures had no authority to impose indirect taxes unless they came within the scope of sub-sect. 9 of sect. 92, and that the taxes imposed were not direct taxes.

It will be said that in the case of *Dow v. Black* (4), the Privy Council stated that there might be other taxes imposed under sub-sect. 16, besides those mentioned in sub-sects. 2 and 9, but this was entirely outside of the case since their Lordships were of opinion that the tax claimed was a direct tax and they did not indicate what other taxes could be imposed under sub-sect. 16, and therefore it cannot be said to what they alluded by the observation they made. I am, however, free to admit that there may possibly be some taxes which might be imposed for local purposes under sub-sect. 16.

[146] When we consider that every provision of the B. N. A. Act shows that the object of the promoters of the measure was to place each Province in a state of perfect independence as regards each other, to establish the utmost freedom of intercourse and commer-

(1) 2 Can. S. C. R. 70; *ante*,
vol. 1, p. 414.

(2) 3 App. Cas. 1090, *ante*, vol.
1, p. 117.

(3) 10 App. Cas. 141; *ante*, vol.
3, p. 190.

(4) L. R. 6 P. C. 272; *ante*, vol.
1, p. 95.

cial relations between them, to exclude from the legislative authority of the Provinces all regulations as to trade and commerce, customs and excise, navigation and shipping, banks, bankruptcy and insolvency—in fact every subject which might give occasion to an interference by one Province directly or indirectly which would affect the interests of the other Provinces ; it is impossible to suppose that it was intended to allow the several Provinces to raise their revenue by taxes calculated to reach the inhabitants of the other Provinces, their monetary institutions, their telegraphs and insurance companies, and the natural or industrial products of each by duties imposed, not on the products themselves (this is expressly forbidden by the B. N. A. Act), but upon every railway company, every steamship or other navigation company, whose railways or ships should be employed to move such products from one Province to another or to a foreign market. Such a pretension is inconsistent with the whole object and intent of the Act, as disclosed by almost every disposition which it contains, and affords a strong argument against the validity of the present tax.

The words "*Direct taxation within the Province*," seem to imply that the taxes to be imposed must be raised from persons residing or property situated within the Province by which they are imposed, and not otherwise ; and it is a characteristic feature of direct taxation, that it is only raised from persons residing in the territory where it is imposed or on property therein situated. I do not mention this as decisive, but as an indication of what was meant by "direct taxation" in the B. N. A. Act.

To pretend that the present tax is a direct tax, would be to hold that it is a personal or capitation tax. A capitation tax, as its [147] name indicates, is a general tax imposed on each head of a family, or on every male inhabitant in the community. I do not know how this could apply to a corporation, and more particularly when it is imposed on the capital of such corporations, and on the several offices which they have ; the effect of which would be that several capitation taxes might be imposed on the same corporation, as is the case with the Merchants' Bank, from which five or six taxes are claimed, by reason of the several offices it has in the Province.

Whether this tax is considered from the evident intention of the framers of the B. N. A. Act. as disclosed by its enactments, or from the various dispositions contained in other Acts of the Imperial Parliament as regards similar taxes raised in England, or again from the light to be derived from the decisions of the Supreme Court and of the Privy Council, or from those of the United States, and

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the general tenor of the definitions given by political economists on the subject of direct and indirect taxation, I cannot arrive at any other conclusion but that the present taxes must be held to be *excise* and *indirect taxes*, which the Provincial Legislatures have no right to impose.

I would confirm the judgments in the five bank cases and reverse the judgments in the other four cases. I am, however, in the minority, and the judgments in the bank cases will be reversed, and the others confirmed.

CROSS, J. :—

The observations which I am about to read were prepared more particularly in the case of *Lambe v. The Ontario Bank*, but they are for the most part applicable to all the other cases.

William B. Lambe, license inspector for the revenue district of Montreal, sues the Ontario Bank as a corporation having its place of business in the city and revenue district of Montreal, claiming \$1,200 as a tax upon their banking capital of \$1,500,000 and an additional tax of \$100 for having an office or place of business in the city [148] of Montreal, said taxes being claimed as imposed and due under the Statute of Quebec, 45 Vict. c. 22, entitled an Act to impose certain direct taxes on certain commercial corporations, and which by sect. 3 declares that the annual taxes imposed upon and payable by the commercial corporations mentioned and specified in section one of this Act shall be as follows: 1st. Banks. Five hundred dollars when the paid-up capital of the bank is five hundred thousand dollars or less than that sum; one thousand dollars when the paid-up capital is from five hundred thousand dollars to one million dollars, and an additional sum, of two hundred dollars for each million or fraction of a million dollars of the paid-up capital, from one million dollars to three million dollars, and a further additional sum of one hundred dollars for each million or fraction of a million dollars of the paid-up capital over three millions.

To this action the Ontario Bank pleaded to the effect that by sect. 91 of the B. N. A. Act, 1867 the exclusive legislative authority of the parliament of Canada extended among other things to: 2. The regulation of trade and commerce: 3. The raising of money by any mode or system of taxation; 15. Banking, incorporation of banks and the issue of paper money. By sect. 92 of the same Act in each province, the legislature might exclusively make laws for among other things: 2. Direct taxation within the province, in order to the raising of a revenue for provincial purposes; beyond which no power of taxation was granted to the legislature of any province.

The Ontario Bank held its charter under the Dominion statute, 34 Vict. c. 5, entitled "An Act relating to banks and banking," amended by subsequent Acts; their capital of one million five hundred thousand dollars was held and owned by shareholders whereof two-thirds resided out of the Province of Quebec. Their chief place of business was in Toronto, Ontario, where more than two-thirds of their capital was employed, and about a third in the Province of Quebec; that under the powers conferred by their charter they did business and had offices and agencies throughout the Dominion and beyond the Province of Quebec; that the tax in question was not [149] direct within the meaning of said 92nd sect. of the B. N. Act. It interfered with the regulation of trade and of banking by imposing restrictions thereon; that it affected persons beyond the limits of the Province of Quebec; that it purported to be regulated by the amount of the paid-up capital used and held beyond the limits of the Province; it was unjust, partial and discriminating against one set of persons for the benefit of another set. That by reason of what was so pleaded the Act of the legislature of Quebec, under which said tax purported to be imposed, was illegal, unconstitutional and *ultra vires*.

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The demand being based on the provincial statute to which it refers, and there being no dispute about the facts set forth in the plea, an admission was made of the essential statements it contained, and the issues thus raised were submitted upon arguments made by the parties to the Superior Court which, by its judgment, held that the statute of the Province of Quebec, 45 Vict. c. 22, in so far as it imposed the tax in question, was unconstitutional and *ultra vires*. Hence the present appeal brought by the license inspector. A preliminary question was raised, that the statute of Quebec invoked was a nullity and had no existence in law, because passed in the name of the Queen in place of the legislature of Quebec. I have not thought it necessary to discuss this point, having no doubt that the statute was formally sanctioned by all the legislative power of the Province and so sufficiently appears on the face of it. I think I am warranted in not treating this point as serious.

The main question raised is purely one of law, viz:

Whether the statute of Quebec, 45 Vict. c. 22, in so far as it imposes the tax in question is within the power of the provincial legislature. The debatable ground as to the relative powers of the Dominion and provincial legislatures has been narrowed by the number of decisions which have been rendered on subjects nearly approaching the one now under discussion. In *Severn v. The Queen*, (1)

(1) 2 Can. S. C. R. 70; *ante*, vol. 1, p. 414.

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[150] a provincial statute requiring a brewer to take out and pay a sum of money for a license for permission to carry on his business was held to be in conflict with the power of the Dominion Parliament to regulate trade, and also that it was an indirect tax. In the case of the *Attorney-General for Quebec v. Queen Insurance Co.*, (1) it was held that the statute of Quebec, the Quebec License Act of 1875, 39 Vict. c. 8, was virtually a stamp Act and that the tax thereby imposed was an indirect tax.

In the case of *Citizens' Insurance Co. v. Parsons*, (2) it was held that the terms, property and civil rights, 13thly enumerated in sect. 92 of the B. N. A. Act, included rights arising from contracts where not explicitly mentioned as comprised in any of the powers conceded to the Dominion legislature under sect. 91, that for the protection of property and civil rights within the Province, a local legislature could impose conditions to contracts of insurance becoming operative within the Province. In *Russell v. The Queen*, (3) it was determined that the Canada Temperance Act of 1878 does not belong to the class of subjects included by the denomination of property and civil rights in the enumeration of powers attributed to the provincial legislatures by sect. 92 of the B. N. A. Act. In *City of Fredericton v. The Queen*, (4) it was determined that the Canada Temperance Act of 1878 was within the competency of the Dominion legislature which alone had the power to pass such an Act in virtue of their power to regulate trade and commerce. In *Hodge v. The Queen*, (5) it was held that the Ontario License Act of 1877, authorizing the adoption of resolutions in the nature of police or municipal regulations or by-laws, fixing the hours for selling liquors and keeping open billiard tables, was of a local character for the good government of taverns, etc., and did not interfere with the general regulation of trade and commerce, and was within the powers of the provincial legislature.

[151] These decisions will still leave considerable room for discussion as to the relative powers of the Dominion and Provincial legislatures, and the fixing of an exact line of demarcation between them, which it appears difficult to reach on any general principle, and has consequently in part to be considered in relation to each individual case which seems to present a doubt, and that now under discussion

(1) 3 App. Cas. 1090 ; *ante*, vol. 1, p. 117.

(2) 7 App. Cas. 96, *ante*, vol. 1, p. 265.

(3) 7 App. Cas. 829 ; *ante*, vol. 2, p. 12.

(4) 3 Can. S. C. R. 505 ; *ante*, vol. 2, p. 27.

(5) 9 App. Cas. 117 ; *ante*, vol. 3, p. 144.

may be fairly reckoned as one of such cases, that is a case not wholly settled by any previous decision, although its determination is doubtless aided by the principles laid down in previous decisions. It is therefore yet an open question whether the tax in question, imposed in virtue of the statute of Quebec, 45 Vict. c. 22, purporting to authorize the levy of what it terms direct taxes on the paid-up capital of banks doing business within the province, is *ultra vires*, and whether said statute in so far as it purports to impose such tax, is unconstitutional. It may be assumed that the power of taxation by an independent sovereign state is unlimited as regards the persons and property falling within its jurisdiction. The powers we have to consider are derived from a plenary source, and have to be construed as falling within the limits of the grant by which they are conferred. Whether the powers conveyed are in the aggregate plenary, being distributed, that is divided between two authorities, the dominion and provincial, they cannot be plenary to each, but the division has been so contrived as to be in part exclusive to each, and in some particulars it must be conceded common to each.

The terms in which these powers are conveyed are of necessity very general for the most part, and although as regards certain of them, a clear distinction may be obvious, yet there are others which seem to run into and overlap each other, rendering it difficult to obtain a clear line of demarcation.

The powers of the provinces are exceptional and are enumerated, save as to No. 16, which comprises "generally all matters of a merely local or private nature in the province." The powers of the Dominion are general "To make laws for the peace, order and good [152] government of Canada in relation to all matters not coming within the classes of subjects by this Act, assigned exclusively to the legislatures of the provinces;" but for certainty, although not to restrict the generality of the powers conceded, an enumerated class of subjects under twenty-nine heads are assigned exclusively to the Dominion, none of which subjects are to be deemed of a local or private nature, as assigned to the provinces under sect. 92. It follows that the powers of the provinces are restricted to those specially enumerated in sect. 92 as assigned to them, and are limited by the terms and conditions on which the concession is made. They are further restricted by the exercise of the Dominion enumerated powers specially given by sect. 91 which may conflict with the enumerated powers of the provinces assigned to them as specified under sect. 92. Where exclusive powers seem to have been given to both as in the case of direct taxation, then with due consideration of the above qualification the provisions

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so conflicting must be read together so as to give reasonable effect to both, especially where such seems necessary for the working of the Act.

With the aid of these inferences drawn from the terms of the statute and making allowance for the ground covered by the decided cases, there is still much room for controversy in the cases that are continually arising in relation to these relative powers. The experience of the United States of America and the judicial decisions rendered there on constitutional questions, are naturally looked to as of value in solving questions arising under our constitution. One consideration of importance to be kept in view in the application of decided cases there, as precedents for us, is that with them each state was considered as originally possessed of sovereign authority over persons and property within its jurisdiction; that in forming their confederation all powers not specially conferred or surrendered to the general government were reserved to the States. The British North America confederation proceeds from an opposite standpoint, on the opposite theory, providing, as in effect [153] it does that all powers not expressly conferred on the local or provincial legislatures are attributed to that of the Dominion. The power of the state governments in the United States is relative to the United States government greater than that of the provinces to the Dominion, yet it has been held uniformly by the Supreme Court of the United States, that the general government was possessed of certain implied powers convenient or necessary for carrying on the functions of the government, and that within their sphere, the government of the Union was supreme. Cooley on Taxation, at p. 57, No. 3, says "the means or agencies provided or selected by the federal government as necessary or convenient for the exercise of its functions, cannot be subjected to the taxing power of the states. The states cannot tax a bank chartered by congress as the fiscal agent of the government," in support of which he cites the case so often referred to, of *McCulloch v. Maryland*, (1) where it was held that "the state governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers. The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into effect the powers vested in the national government." The bank in question in that case was a quasi commercial enterprise owned in great part by private shareholders, yet it was chartered as a United States bank, and was the financial

(1) 4 Wheaton, 316.

agent of the government. C. J. Marshall, who pronounced the judgment, among other remarks stated in effect, that although no express authority was given by the constitution of the United States, either to create corporations or to establish banks, and although it was conceded that the inherent power of taxation remained with the people of each state to the full extent to which it had not been alienated ; although the federal government itself [154] could exercise no powers but those granted to it, which were enumerated powers, yet the government of the union, limited as it certainly was nevertheless was supreme within its sphere : that although among their enumerated powers were not to be found that of establishing a bank or creating a corporation, yet as an attribute of sovereignty it could create corporations, and as a means to carry into effect the objects of the government with which they were entrusted, it could establish banks, and the agencies of those banks throughout the United States were not subject to taxation by the state power ; that the Act to incorporate the bank of the United States was made in pursuance of the constitution, and was part of the supreme law of the land ; that the tax imposed on this bank by the state of Maryland was incompatible and repugnant to the constitutional laws of the union ; that it was a franchise created by the United States congress within their exclusive attribute of powers, and what they had a right to do the state government had no right to undo ; that the power of the United States to create implied a power to preserve ; that a power in the state of Maryland to tax the bank created by the United States would be a power to destroy, and if wielded by a different hand would be incompatible with the power to create and preserve ; that when such repugnance existed the authority which was supreme should control and not yield to that over which it was supreme. He further remarked : If the states could tax one instrument employed by the government in the execution of its powers, they might tax any and every other institution. They might tax the mail ; they might tax the mint ; they might tax patent rights ; they might tax the papers of the custom house ; they might tax judicial proceedings ; they might tax all the means employed by the government. It was, however, conceded in that case that the denial of the state power to tax did not extend to the real estate of the bank, nor to the interest of the shareholders resident within the state imposing a tax upon their property in shares.

[155] In *Weston v. Charleston* (1), it was held that the state legis-

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lature could not by taxation or otherwise retard, impede, burden or in any manner control the operation of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. In the case of *Osborn v. United States Bank*, (1) it was held that a State cannot tax the bank of the United States, and that any attempt on the part of its agents and officers to enforce the collection of such tax against the property of the bank would be restrained by injunction. In *Brown v. Maryland* (2) C. J. Marshall says: "We admit this power to be sacred, (the state power to tax its own citizens or their property within its own territory), but cannot admit that it may be used so as to obstruct the free course of a power given to congress." In the case of *Railroad Co. v. Peniston* (3), it was held by a majority of the judges that a tax upon a railway company incorporated by congress to run through several states, imposed by the state on property of the company within the state, was valid, but a tax upon the operations of the company being a direct obstruction to the exercise of federal power could not be allowed, thus making a distinction between a tax on the franchise and a tax upon the property. The minority of the judges were of opinion that the tax even on the property of the company, although within the taxing state, was invalid.

In applying to the present case the principles that run through these decisions, I think it must be assumed that where by the B. N. A. Act, the Dominion government are given an exclusive power, it stands in the same relation to the power, and is entitled to the same protection from the courts as the power conceded to the congress of the United States for the exercise of their functions of government. Moreover, we find no instance where an [156] express power given to the congress of the United States has been by the sanction of the courts interfered with by taxation or otherwise by the state power.

If the power of the Dominion legislature be exclusive for the regulation of trade and commerce, and in the matter of banking and the incorporation of banks, and the power of the provincial legislatures limited to direct taxation and the issue of certain

(1) 9 Wheaton, 738.

(2) 12 Wheaton, 419, 448.

(3) 18 Wallace, 5.

classes of licenses, it follows that banks created by the Dominion legislature for the purpose of doing business throughout the Dominion cannot be taxed, retarded, impeded, burdened or in any manner controlled by the operation of any enactments of the provincial legislatures. The same should hold good as regards the regulation of trade and commerce, at least as to general trade and commerce of public or general interest to the Dominion.

This is evidently the view adopted on the subject in the United States. Cooley, at p. 62, remarks: "When, therefore, it is held that a power to tax is at the discretion of the authority which wields it, a power which may be carried to the extent of an annihilation of that which it taxes, and therefore, may defeat and nullify any authority which may elsewhere exist for the purpose of protection and preservation, it follows as a corollary that the several states cannot tax the commerce which is regulated under the supremacy of congress." Burroughs on Taxation, p. 93, sec. 64, Regulation of Commerce: "The constitution provides that congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . . . The doctrine is now firmly established that the taxing power of the states, while it may be exercised upon all property within their limits upon the goods carried or the instruments of commerce as property, and thus indirectly affect commerce, yet where the tax law amounts to a regulation of commerce, it is void, because in conflict with the power granted to congress, which when exercised is exclusive and supreme."

It was admitted in these American cases, as, in fact, the powers by [157] the constitution reserved to the States, permitted each of the States the right to create banks and other corporations of their own, and to tax such institutions of their own creation, but the power to tax a United States bank as such—that is, on its existence or its operations, in other words its franchise or capacity to do business—was always denied and held to be unconstitutional. If, therefore, a bank of the United States could not be taxed by state power, nor thereby retarded, impeded, hindered, or in any manner, controlled, by the same process of reasoning it follows that in a matter where the Dominion government has been attributed exclusive authority, the provincial government cannot be permitted to render its exercise nugatory by assuming to tax the legitimate

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operations of that Dominion government acting within the sphere of its attributes. The same rule should hold good where the tax affects trade and commerce, at least the general trade of the country. The provincial statute, 45 Vict., c. 22, now in question is the renewal with an extension of the subjects of the attempt made to raise revenue from insurance companies under the statute of Quebec, 39 Vict., c. 7. The proposed exaction being now by the former of these Acts styled a direct tax ; the first attempt proved futile, the tax, being held unconstitutional by the decision in the case of *Attorney General for Quebec v. Queen Insurance Co.* (1) The fact that it is now called a direct tax, will not alter its nature, nor do I think add to its validity.

It seems to me that the tax in question is open to a further objection by the want of territorial jurisdiction in the Quebec legislature over the subject of taxation. By the terms of enumeration 2 of sect. 92 of the B. N. A. Act "direct taxation within the province," the provincial legislature is not entitled to exercise its taxing power on objects beyond the territorial limits of the province. The statute of Quebec, 45 Vict., c. 22, s. 1, purports to impose the tax on every bank carrying on the business of banking in this province and under sect. 3 the rate of tax is scheduled according to the amount of its paid-up capital. The respondent is [158] a bank incorporated by Act of parliament and holds its present charter under the Dominion statute 34 Vict., c. 5, and amendments. Its head office is at Toronto, in Ontario. Its paid-up capital is located at Toronto, and so far as being provincial property is within the jurisdiction of Ontario. It is true that it is represented in the Province of Quebec by its agents there and it employs some of its capital in the Province of Quebec. These agents and the capital employed in the Province of Quebec are within its local jurisdiction, and as such may be proper subjects of taxation within its provincial power, but they are not taxed as such, on the contrary, it is the paid-up capital of the bank, its franchise or capacity to do business which is attempted to be taxed, and which is not within the jurisdiction of the Province of Quebec.

If the franchise or capital were taxable within the Province of Quebec, it would be much more legitimately taxable in Ontario.

(1) 3 App. Cas. 1090 ; *ante*, vol. 1, p. 117.

and would be equally taxable in each of the provinces in which the bank might open an agency, so that it might come to be taxed for the necessities of seven several provincial governments as well as liable to a like visitation from the federal power. This again would not interfere with direct taxation of its property within the province. In such case would any or all of these taxes be direct? and if any, which? Now, although duplicate taxation is not impossible, the law generally presumes against it even within the same jurisdiction, see Cooley on Taxation, p. 165, nor do I think that it would be tolerated that by coercion of the agency within its limits, a provincial government could lay a tax on a franchise or property beyond its limits. A government with plenary powers might exercise such indirect coercion, but it is altogether inapplicable to the circumstances of the present case. The principle of confederation necessarily implied that one province would not interfere with the taxable subjects or property of another province, hence the qualifying words "within the Province" in No. 2 of sect. 92, include this limitation, which would have been implied from the circumstances [159] had even this express qualification been omitted. Cooley at p. 15 says: "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." And at p. 14 he says: "Taxation and protection are reciprocal. . . . A personal tax cannot be assessed against a non-resident; neither can the property of a non-resident be taxed unless it has an actual situs within the state." In the case of *Leprohon v. City of Ottawa* (1), in the Court of Appeal, Ontario. Mr. Justice Patterson says: "The restriction confines such taxation within the province." I think this has not been questioned. The paid-up capital of a bank is necessarily a very fallacious data for taxation. At the very outset of the business of the bank the capital must of necessity have been diminished by preliminary expenses. If prosperous in business its assets must come to exceed its paid-up capital, if the reverse its paid-up capital is an unfair basis of taxation. When the franchise is taxed it is usually on its estimated value as a facility for doing business. In Burroughs on Taxation, at p. 164, he says: "The right of the corporation to exist and exercise the powers vested in it by its charter is called its franchise;" and

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(1) 2 App. Rep. 522, 560; *ante*, vol. 1, pp. 592, 635.

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at p. 166 § 85, "Tax on the franchise.—This tax is in its essential nature the same as the license tax, and the same principle as to the power of the state to tax applies to domestic corporations when they are first chartered as applies to foreign corporations." Again, at p. 174 § 87: "Capital how taxed (that is of corporations).—Corporations are sometimes taxed on their nominal capital and sometimes on its actual value. When taxed on the nominal capital, the tax is upon the whole amount paid in or secured to be paid without reference to losses. The capital is referred to as a measure of the price to be paid for the franchise." In the case of a foreign corporation the bonus or tax is the amount paid for the privilege of exercising its corporate powers in the state. In the case of a domestic corporation it is the amount paid as the price of its corporate existence. It only exists by the permission of the state, and the state may prescribe the terms on which it will grant its permission. From this it would appear to have been held in the United States that the state power can tax the franchise of a corporation created without the state, but only on the ground of its being a license or permission to do business within the state. But the taxing power of a state exceeds that of a province. It extends to the regulation of trade in the state and to all powers of taxation not expressly surrendered by the state. It is not by its charter limited to taxation within the state. This doctrine, I apprehend, would be inapplicable to the circumstances of the provinces and their relations to the Dominion. It would be likely to lead to mischief, and I think ought to be open to question even in the United States: In the case of *Paul v. Virginia* (1), it was held that corporations were creations of local law, and had not even an absolute right of recognition in other states, but depended for that and for the enforcement of their contracts upon the assent of the state (where their contracts were sought to be enforced), which might be given accordingly on such terms as they pleased. In the present case what has been attempted to be taxed has not been brought within the jurisdiction of the legislature of the Province of Quebec. The tax is on its paid-up capital whose situs is without the Province. As to whether the tax is direct or indirect, I entertain no doubt in my mind that it is in its nature a very indirect tax. It is not on property nor on persons and it has to be

(1) 6 Wallace, 168.

collected not directly from the object taxed, but indirectly by operating on the agency and property which the corporation may have in the province, not certainly from its franchise or paid-up capital, therefore to my mind very manifestly indirect ; but on the general question as to what are direct and what are indirect taxes, I have found it difficult to arrive at any well defined recognised line of distinction. As near as I can arrive at what should be reckoned a direct tax, it is one levied immediately on property [161] or persons and perhaps on income. I doubt whether in any case a tax on a corporation or company as such, that is on its capacity to exist and to do business, could be ranked in either of those classes. If its proper situs were without the jurisdiction of the taxing power, it could not be legally taxed. In any case its shares held within the province and any of its property there situate, would as such be liable to taxation in the same manner as other property pertaining to individuals. The taxation of domestic corporations and companies would be open to the objection of duplicate taxation, and would to my mind be an indirect tax, as one in the nature of a license imposed upon their capacity to exist and do business, and which would have been classed as a license tax had it been intended to empower the levying of it, on the provincial government. I am not quite certain that their Lordships of the Privy Council did not intend to decide squarely in the case of *Attorney General for Quebec v. Queen Insurance Co.* (1), that a tax of the nature of the one now in question was unconstitutional in whatever form imposed, whether called a direct tax or by whatever name it was intended to be levied. They certainly ruled in that case that the tax was indirect, and as regards classification I cannot distinguish it from the one now in question. They also held that the Act in question was virtually a stamp Act, although in name a license Act. The case of *Serern v. The Queen* (2) seems also directly in point.

Whoever remembers the general sense in which the subject was discussed in the press and by politicians before and at the time of confederation, will have little difficulty in recognising the nature of direct taxation as then understood, at least in the then province of Canada. They doubtless had in view the example and received

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(1) 3 App. Cas. 1090 ; *ante*, vol 1,
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(2) 2 Can. S. C. R. 70 ; *ante*, vol.
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construction of the terms in the United States, the burden was looked upon as one which would fall upon real estate. The charges of government had been sustained for the most part by customs duties on imports, to which something had been added by the [162]license power. Except for municipal purposes, for the most part in the cities, there had been no imposts on property or persons. As expenses of the government increased, there was an apprehension that these might have to be resorted to. A resort to this mode of raising revenue was looked upon as an extreme measure, and one likely to be very unpopular, but of possible necessity, not likely to be resorted to so long as the government could exist and carry on its functions by only taxing imports.

In forming the confederation the danger must have been foreseen of allowing the local governments the power of indirect taxation. It would obviously be their interest to exist and defray their charges by imposts upon the trade of the country, more especially the through trade, and their inclination would naturally lead them to avoid a direct charge on their constituents. It was of importance that trade should not be embarrassed by local burdens hence its regulation was assigned to the Dominion. I cannot think that a tax upon corporations or companies as such, can be considered a direct tax, more especially on those having their proper situs without the province, nor can such tax be held legal in the face of the other reasons already stated. I therefore concur in the judgment rendered in this case by the Superior Court. I hold that the tax in question in this cause is unconstitutional and void, and that the judgment of the Superior Court in this case should be confirmed. I am, however, with the Chief Justice in the minority, as regards the opinion entertained by this court.

[Translated.]

TESSIER, J. :—

After the long dissertations of my colleagues who have preceded me, and the numerous precedents and authorities which have been cited and commented on, it is sufficiently evident that the matter is exhausted and I do not wish to run the risk of making observations which would only be a repetition of what has been said.

I shall content myself with mentioning briefly the propositions which sum up my opinion.

[163] 1. The Confederation Act has conferred on the federal parliament and the provincial legislatures distinct powers in some cases and concurrent powers in others.

The provincial legislatures are governments having the rights and privileges inherent in the exercise of government; the special mention of particular rights in section 92—is only declaratory looking especially at sub-section 16, which says: “And generally all matters of a merely local or private nature in the province.”

The right of taxing in order to raise a revenue and pay the public expenses is not an attribute of the sovereignty under the English constitution, but a right inherent in the parliaments and legislatures which are governments representing the people.

In the case of *Hodge v. The Queen* (1) one of the judges of the privy council, thus expressed himself: “Within these limits of subject and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.”

2. The tax in question in this case is a direct tax. It is true that the Confederation Act does not nor do any of our laws define what is a direct tax. The present tax is after all only a personal contribution or a personal tax which is only a direct tax.

What is very certain is that, apart from the direct tax on persons or the indirect tax on imported goods, as to all other taxes the economists do not agree and are in contradiction, as is said in Cooley on Taxation, p. 5: “The term direct taxes is employed in a peculiar sense in the Federal Constitution,” in England, in France and in the [164] United States when it is a question of classing them as direct taxes or as indirect. The definitions of the United States cannot be applied here as M. Leroy-Beaulieu says in his “Treatise of the Science of Finances,” vol. 1, p. 214, after having demonstrated that the definition of direct and indirect taxes given by the administration in different countries is not always exact, he proposes the following as being the most scientific and satisfactory that he has been able to find:—

“Par l'impôt direct le législateur se propose d'atteindre immé-
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(1) 9 App. Cas. 117, 132; ante, vol. 3, pp. 144, 162.

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atement du premier bond et proportionnellement à sa fortune ou à ses revenus, le véritable contribuable ; il supprime donc tout intermédiaire entre lui et le fisc, et il cherche une proportionnalité rigoureuse de l'impôt à la fortune ou aux facultés.

“ Par l'*impôt indirect* le législateur ne vise pas immédiatement le véritable contribuable et ne cherche pas à lui imposer une charge strictement proportionnelle à ses facultés : il ne se propose d'atteindre le vrai contribuable que par ricochet, par contre-coup, par répercussion ; il met des intermédiaires entre lui et le fisc, et renonce à une stricte proportionnalité de l'impôt dans les cas particuliers, se contentant d'une proportionnalité relative en general.”

M. Passy who furnished to the Dictionary of Political Economy, published by M. M. Coquelin and Guillaumin, the article on taxation, says also :—

“ C'est un usage reçu de diviser les impôts en deux catégories distinctes. On appelle *directs* ceux que les contribuables acquittent eux-mêmes pour leur propre compte : on appelle *indirects* ceux dont certains d'entre eux ne font que l'avance et dont ils obtiennent le remboursement des mains d'autres personnes.”

Mill—Principles of Political Economy, book v., ch. 3. sect. 1, says :—

“ Taxes are either *direct* or *indirect*. A *direct tax* is one which is demanded from the very persons who it is intended or desired should pay it. *Indirect taxes* are those which are demanded [165] from one person in the expectation and intention that he shall indemnify himself at the expense of another : such as the *excise* or *customs*.”

Walker—Science of Wealth, p. 838 :

“ A *direct tax* is demanded of the person who it is intended shall pay it. *Indirect taxes* are demanded from one person, in the expectation that he will indemnify himself at the expense of others.”

Such is the system most generally adopted at the present day.

An incorporated company is only a legal person within the meaning of our laws ; that is defined in our civil code, art. 17, sub sect. 11—“ The word person includes bodies politic and incorporated.”

In interpreting these definitions it seems to me evident that that is a direct tax on the judicial or legal person who pays the tax

directly. The shareholder is reached directly because he is joined to the corporation as a member of that corporation. It is the common capital of the corporation which is taxed. It is not a license nor a tax on the franchise because nothing in that law hinders the bank from continuing its transactions; neither each part nor the business of the company is taxed.

8. Whatever may be the theoretic opinion of economists on direct or indirect taxes, the present tax is one which the legislature of Quebec had the power to impose taking our constitution as a whole. In saying that the legislature has the right of imposing direct taxes it seems to me that the wish has been simply to make certain that the provincial legislatures should not have the right of imposing taxes on imports which is the great recognised example of indirect taxation. In enquiring whether the tax in question in this case will be paid indirectly by others, as in the case of imported goods, it may be said that this tax on the capital of societies or incorporated companies is a direct tax, affecting only the corporation and not the persons who do business with it. The shareholders and the incorporated company are but one, it is the same person making a single legal being.

[166] As to the objection that the capital of banks and other incorporated companies is in great part situated out of the province, that is a specious and unfounded objection; the capital of a bank is not divisible, it is supposed to exist as a whole and to answer as a whole for the business where there is an office open. For example a depositor who deposits a thousand dollars in the Bank of Commerce at Montreal has a right to rely on all the capital of that bank and has recourse for payment of his deposit against the whole capital of the bank, although that bank employs a great part of its capital in the Province of Ontario. By operation of law a bank or an incorporated company transports all its capital into every place where it does business.

There are some shareholders resident out of the province, in England, in the United States. That matters nothing. There is only one moral and legal being in which all the shareholders are united no matter where they reside. For example, suppose that the federal parliament had imposed the same tax which is here in question on the banks, would these institutions be able to avoid paying these taxes by alleging that part of their shareholders live in

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England or elsewhere, and that part of their capital is employed in one of their offices established in England or in the United States? Evidently this objection would be rejected; why should it not be when it is a question as to the same tax imposed by the legislature of Quebec?

The Confederation Act was passed with the object of conciliating the interests and the rights of a pre-existing province; that Act should be liberally interpreted. It is but a federal alliance in which each province has been constituted with a regular government; the provinces should reasonably and liberally have the right of maintaining themselves and of raising the revenues necessary for their support.

If it had been desired to limit the powers of the provincial legislatures to certain particular subjects, why not have defined these powers and then said afterwards that all other powers belonged [167] to the federal parliament. On the contrary it has been necessary to specify in sect. 91 the special powers of this parliament in certain cases, as in a treaty between two independent parties which specifies the rights belonging to each.

Incorporated companies form a general class of people who exercise in the state commercial privileges without being responsible in their own property like other individuals, but with limited liability. It is but just that they should contribute to the revenues of the province in which they do business with the object of gain.

In my opinion the Confederation Act is a model of legislation which I have always admired. It required a great effort of science, intelligence and experience to include in one law of 147 sections, the regulation of interests so varied of several provinces covering an immense territory with different systems of law. The general terms employed shew that the wish has been to give a necessary elasticity in our constitution. It is for our courts to give a reasonable interpretation in order to reconcile all interests and not create and favour those which are disposed to raise conflicts.

It seems to me perfectly reasonable that these incorporated companies which have the protection of the provincial laws, which profit by our police and municipal laws should furnish their part of the revenue for the maintenance of our provincial government.

I concur willingly in the judgment of this court, which maintains this tax as being constitutional; it is not excessive, it is reasonable and justifiable and I think that it ought to be maintained.

RAMSAY, J. :—

One of the learned counsel who addressed the Court said that instead of getting clearer the dividing line between federal and local powers was getting more obscure. Unfortunately this pessimist view of the matter is not altogether unreal. Opinions are very [168] divergent, and many of those who are qualified to speak, and who, moreover, are entitled to speak with authority on the subject, seem to disagree irreconcilably on questions of the utmost importance. This is not altogether satisfactory, it must be confessed, but it is our duty, however, not to be discouraged but to strive manfully to find out the solution of all these difficulties. Some solution there must be ; and it will be discovered by those alone who seek for truth and not for triumph ; and, above all, by those who are not seeking to further some cherished political dream or selfish project. In deprecating certain kinds of discussion, it does not follow that one dreads strife, or is alone content to see a cautious reserve or a lethargic indifference. On the contrary, it is salutary that every possible position should be debated with the utmost zeal and with the keenest logic. What is to be deplored is the waste of time and effort, and sometimes talent, which could be turned to better account, in sustaining impossible themes or in circulating irritating subtleties. If confederation is to be a success we must interpret the constitution with the utmost loyalty. In great measure the responsibility of this task devolves upon the courts. At all events, there the questions in their most abstract form present themselves, and therefore it is that every judicial utterance on this subject should be given forth under the sanction of the gravest responsibility. We are dealing, not with a trifling statute passed to regulate some paltry concern, but with the constitution of, perhaps, a great nation. Speaking with the fullest consciousness of this responsibility, I do not hesitate to say that to pretend that the Acts of 1774 and 1791 have any direct bearing on the interpretation to be given to the B. N. A. Act appears to me to be neither loyal nor honest. Again, to magnify the powers of the federal parliament, by a forced interpretation of the constitutional Act, so as to absorb almost all the local powers, is disloyal and dishonest.

Being of this mind, I adopt unreservedly the doctrine put forth by those opposed to the tax complained of, when they say that the [169] powers of the provinces are all to be found contained in the

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constitutional Act and its amendments, and by parity of reasoning it must be admitted that the federal powers are derived from the same source. We may say of Canada, as C. J. Marshall said of the United States, and with greater emphasis: "This government is acknowledged by all to be one of enumerated powers:" *McCulloch v. Maryland* (1). Hence we have the doctrine everywhere proclaimed that the local legislatures are as omnipotent within the sphere of their powers as the Dominion parliament is within its jurisdiction. It would be difficult to arrive at any other conclusion, for when the Queen, Lords and Commons give a power it cannot be questioned by any other authority. The extent of the grant may alone be questioned. Lest it be thought that I unwittingly neglect advice proffered by high authority, I shall at once refer to a *dictum* of the Privy Council which now especially demands our attention, and which, it appears to me, may be easily misunderstood. In the case of *Citizens' Insurance Co. v. Parsons* (2) their lordships said, referring to the difficulty of arriving at the proper interpretation of sects. 91 and 92, "In performing this difficult duty it will be a wise course for those on whom it is thrown to decide each case as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand." If this rule were adopted literally it would be the enthronement of empiricism. But it is to be observed that their lordships only gave this caution when dealing with the dangers of the double enumeration of sects. 91 and 92, and the evident misuse of the word *exclusively* in each section. The warning was against making precedents before experience had given a guide as to the working of the new constitution. So considered I recognise the wisdom of the caution, and I invoke it as an admission of great authority, that the work of reconciling these conflicting expressions must go on till all the [170] possible cases have been disposed of. The special application of this admission will appear more clearly later on.

From another quarter we have recently received an intimation as to our duty, which also demands our notice and requires qualification. The learned chief justice of the Supreme Court is reported to have said that all the courts in Canada were bound by

(1) 4 Wheaton, 316, 406.

(2) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

the decisions of the Supreme Court. In this saying there is just that grain of truth which is dangerous. It is a rhetorical rather than a legal way of putting the matter. "Aiunt rhetores, iudicatum esse partem juris." There is no such institution of the law as that laid down. The decision binds in the particular case; it is only a rule of authority in other cases. Now the basis of authority is reason, and, therefore, that only which is reasonable is authoritative. It is doubtless very inconvenient that jurisprudence should be uncertain, but it would be still more inconvenient if courts, out of an obsequious deference, adopted as law that which clearly is not law. In practice we follow a middle course, which, while it tends to avoid the perpetuation of error, to some extent renders the administration of justice certain. Volumes of over-ruled cases and the *dicta* of very distinguished judges and jurists attest the correctness of this remark. In *Hogan v. Bernier* (1) a very able judge, now no more, referring to the case of *Dorion and Hyde*, said: "Je ne me crois pas lié par ce précédent, et je regretterais de donner mon concours à l'établissement, d'une jurisprudence que je crois erronée." The precedent which Mr. Justice Dorion deemed himself justified in rejecting as authoritative was a judgment of the Court of Appeal confirming a judgment of his own court in review. To this I shall only add what Hale says on the point: "It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attain, yet they do not make a law, properly so called, for that only the king and parliament can do; yet they have a great [171] weight and authority in expounding, declaring and publishing what the law of this kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times." *Hist. of Common Law*, chap. 4, vol. 2, p. 142. I allude to this specially as the authority of precedents has been particularly insisted on in these arguments, and it seems to me well to observe that two things are to be examined when considering a precedent: 1. Whether it is precisely in point. 2. Whether it will stand the test of reason. And in deciding as to this last, whether it has been assented to at all times.

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(1) 21 L. C. Jurist, 101.

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The case of *Attorney General for Quebec v. Queen Insurance Co.* (1) has been relied upon as conclusive authority against the validity of the present tax. To me it appears to decide absolutely nothing that has to be decided in this case. Firstly, then let us examine what was submitted to the Privy Council, and what was decided there.

When the case came before us, only two propositions were submitted (1) whether the tax was a direct tax, and consequently under par. 2 of sect. 92; (2) whether it was, as it was called, a license, under par. 9. Here it was held, unanimously, that the particular impost then in question was not direct taxation, and by the majority that it was not a license within the terms of par. 9. This decision was confirmed by the Privy Council. Had the determination of these issues been all the scope given to the case, the decision might not have done much mischief, but unfortunately one of the learned judges in this court, in delivering his opinion entered upon a discussion of questions of political economy, purporting to be supported by quotations, which was evidently intended to lay down a general and authoritative distinction between direct and indirect taxation in all cases. It is an ungracious task to criticize a work which necessitated considerable diligence on the part of its author; but it has obtained some recognition, and to my mind it seems so fallacious that I deem it my duty to combat its method and its conclusions on the first opportunity. I may add to this that the speculations on the subject of political economy, which it is sought to incorporate into the law [172] as recognised truths, are peculiarly liable to misconception. Archbishop Whately in his lectures on political economy, recommends the student to consider "a clear definition of technical terms, and careful adherence to the sense defined as the first—the most important—and the most difficult point in the science of political economy." Lect. ix. Disregarding all such caution, it was unhesitatingly asserted that all the authors were agreed, French, English and American, legal and lay, on the line of demarcation, between direct and indirect taxation. Strictly speaking, with the writings of political economists we have nothing to do. If a technical meaning is to be given to a word or words in a statute, that meaning must be proved by testimony

(1) 3 App. Cas. 1090; *ante*, vol. 1, p. 117.

and not by books, like every other fact. We do not even accept foreign law, of which the course of our studies might enable us to know something, on the authority of books; how then could we be expected to guard ourselves from error if we attempted to deal with the technicalities of particular sciences, of which we may be presumed to be perfectly ignorant, on scraps culled from the works of speculative writers?

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I do not then feel myself obliged to show that the scientific writings submitted to us do not sustain conclusively the theories they were brought forward to support, but the course followed in the case of *Attorney General for Quebec v. Queen Insurance Co.* (1) illustrates so perfectly the evil of neglecting the ordinary rule I invoke that I shall not hesitate, once for all, (to protest against an evil practice not to create a precedent), to point out the errors to which it has given rise. It was evidently expected that we should understand that the division between direct and indirect taxes was this, that a direct tax was one which the person who paid it was not expected to get out of another; while an indirect tax was one for the payment of which he expected to be recouped. That this was the lesson supposed to be taught, and on which all the economists were said to be agreed, is beyond question, for it was repeated several times at the argument of the cases now before us. In one place Mill says some- [173] thing like this. I quote from the passage on which Mr. Justice Taschereau relied to show that he agreed with everybody and everybody with him: "A direct tax is one which is demanded from the very persons who it is *intended* or *desired* should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs." But this brilliant writer carries his doctrine out, for he adds: "Most taxes on expenditure are indirect, but some are direct, being imposed, not on the producer or seller of an article, but immediately on the consumer." Now how does this test correspond with what Adam Smith says: "A direct tax operates and takes effect independently of consumption or expenditure, while indirect taxes affect expenses or consumption, and the revenue arising from them is dependent thereon."

(1) 3 App. Cas. 1090; *ante*, vol. 1, p. 117.

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These systems, then, are totally different, and, I take it, neither indicates the meaning of parliament in enacting par. 2, sect. 92, B. N. A. Act. Again, many of the economists, and Mili amongst them, classify taxes into direct and indirect. However, in *Hylton v. United States* (1) Chase, J., said : " I believe some taxes may be both direct and indirect at the same time." Mill also says, " The financial systems of most countries comprise a variety of miscellaneous imposts *not directly included in either class*," i.e., of direct or indirect taxes : Pr. of Pol. E. chap. v., p. 1. The legal definitions in France of *contributions directes et indirectes* do not cover the whole ground of taxation. See what Merlin says as to the *droits d'enregistrement*. He shows they are not indirect under the definition, and certainly they are not direct according to their system.

Turning to the French system, no similarity can be expected between the French and English writers, for the former write under laws which leave little room for doubt as to what is a direct tax in France, and what an indirect one. In one of the scraps quoted from Say, he tells us this ; and a note on the very next page to that quoted [174] by Mr. Justice Taschereau is specially inserted to prevent the cursory reader making the mistake into which the Privy Council all but irretrievably fell. Merlin and Favard de Langlade are also perfectly clear on the point. In fact it is difficult to understand how any one could have copied extracts from these precise writers without seeing that they were exposing a definite, and to some degree an arbitrary rule, and not playing with theories.

In England there are no legal writers on the subject, for there is no legal distinction between the two imposts, and the economists use the terms direct and indirect rather to describe the incidence of the impost, which is often influenced by circumstances over which the legislature has no control, and which it does not even contemplate, than to define terms or to make an abstract classification. Mr. Dudley Baxter admits this : " One of the oldest and most simple definitions divides all taxes into the two heads of direct and indirect taxation ; direct taxes being those which are paid by the person himself, who is meant to be the real contributory, such as assessed taxes, and indirect being those which are paid by an intermediary, who reimburses himself from the real contributor, such as the customs and excise duties. But this definition cannot furnish

(1) 3 Dallas, 171, 174.

us with a trustworthy classification, since it is founded upon an accident in the manner of payment and not upon the nature of the taxes themselves. The income and property tax, for instance, is direct taxation when paid by the owner himself, and indirect when paid by the tenant or mortgagor." The taxation of the Kingdom ; R. Dudley Baxter, page 20. It is otherwise in the United States and France, and also here. By the constitution of the United States a direct tax is imposed, differently from an indirect one. Art. 1 sect. 9, par. 4. Hence the courts have been called upon to designate the classes in order to decide whether the impost is legal or not. In France the question comes before the courts in diametrically the reverse way, for there a tax becomes direct or indirect, not by any quality in the nature of the tax, but by the mode of its imposition. In France it is not a question of expenditure or recoup- [175] ment, but whether the tax is on the person or on a product. Thus the taxes on industries (patentes) are all direct, while the tax on theatre tickets is indirect. After saying what is quoted by Taschereau J., p. 421, Say goes on to establish the real distinction in France, p. 522 :

" Pour asseoir les contributions directes en proportion du revenu des contribuables, tantôt les gouvernements exigent des particuliers l'exhibition de leurs baux, etc., et demandent au propriétaire une part de ce revenu ; c'est la contribution foncière.

" Tantôt ils jugent du revenu par le loyer de l'habitation que l'on occupe, par le nombre des domestiques, des chevaux, des voitures qu'on entretient, et font de cette évaluation la base de leurs demandes : c'est ce qu'on nomme en France la contribution mobilière.

" Tantôt ils estiment les profits que l'on peut faire suivant l'espèce d'industrie que l'on exerce, l'étendue de la ville et du local où elle est exercée ; c'est la base de l'impôt qu'on appelle en France les patentes.

" Toutes ces manières d'asseoir l'impôt, en font des contributions directes.

" Pour asseoir les contributions indirectes et celles dont on veut frapper les consommations, on ne s'informe pas du nom du redevable ; on ne s'attache qu'au produit. Tantôt dès l'origine de ce produit on réclame une part quelconque de sa valeur, comme on fait en France pour le sel.

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“ Tantôt cette demande est faite au moment où le produit franchit les frontières (les droits de douanes) ou l'enceinte des villes (l'octroi).

“ Tantôt c'est au moment où le produit passe de la main du dernier producteur dans celle du consommateur, qu'on fait contribuer celui-ci (en Angleterre par le *stamp duty*, en France par l'impôt sur les billets de spectacles).

“ Tantôt le gouvernement exige que la marchandise porte une marque particulière qu'il fait payer, comme le contrôle de l'argent, le timbre des journaux.

“ Tantôt il s'empare de la préparation exclusive d'une marchandise, ou d'un service public, et les vend à un prix monopole, comme le tabac ou le transport des lettres par la poste.

“ Tantôt il frappe, non la marchandise elle-même, mais l'acquittement de son prix, comme il le fait par le timbre des quittances et des effets de commerce.

“ Toutes ces manières de lever les contributions les rangent dans la classe des *contributions indirectes*, parce que la demande n'en est adressée à personne directement, mais au produit, à la marchandise frappée de l'impôt.” (1)

[176] The similarity of the systems and the unanimity of writers on the subject, generally speaking, is the wildest delusion, it appears to me ; but there is one point common to the legal systems existing in France and in the United States, not unimportant to us, which, curious to say, has escaped the notice of our economic jurists. The common principle to which I refer is this, that the division between direct and indirect taxation is necessarily arbitrary. In France it is formally, and in the United States practically so. In the case of *Hylton v. United States*, (2) Hamilton attempted to lay down a scientific basis for the distinction, but Chase, J., was not misled either by the eloquence or the ingenuity of that distinguished advocate, and he expressed the opinion that, within the meaning of the constitution, a direct tax was on the person and on land, and per-

1[Note de l'auteur.] “Et non parce qu'elles atteignent indirectement le contribuable ; car, si elles tiraient leur dénomination de cette dernière circonstance, il faudrait donner le même nom à des contributions très

directes, comme, par exemple, à l'impôt des patentes, qui tombe en partie indirectement sur le consommateur des produits dont s'occupe la patente.”

(2) 3 Dallas, 171.

haps, on revenue. This has since been confirmed in *Springerv. United States* (1) from which we learn that Hamilton's opinion was really in favour of the judgment in the *Hylton Case*. Now with us there is no doubt that a tax on revenue is of the same nature as a tax on land, and consequently if the one is direct taxation so is the other.

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At the argument a strange proposition was advanced, namely, that a poll tax is not a direct tax unless it was general. It is Mill who says that if a tax is not general it may be avoided, and therefore it is not direct taxation. His reasoning is, that if you tax carpenters and not masons, the carpenters may all become masons. We need not enquire, fortunately for us, how this accords with the consumer argument already mentioned, but what he says only illustrates more fully what I have adverted to already that the English economists are not dealing with a term but are speculating on results which the terms direct and indirect do not express adequately; and that if we were to be guided by what they say, there would be no means of arriving at a conclusion as to what constitutes direct taxation, and we should therefore, be obliged to say that there was no such thing. By a similar process of reasoning, we could more [177] easily arrive at the conclusion that there was no such thing as indirect taxation, and by a little development of this plastic logic we might perhaps arrive at the happy delusion that we are not taxed at all. The passage from Mill to which I refer is in Book v. ch. iii, par. 3. Princ. of Political Economy.

It is only too clear that there is no scientific distinction between direct and indirect taxation, even if we might properly consult scientific books to learn the value of technical terms. But without the aid of the writers on political economy, we must define it, as it has become a law term with us. I am not aware that there is any reason for me to modify what I have said in *Attorney General for Quebec v. Queen Insurance Co.* (2) with regard to this matter, for although the late Master of the Rolls in giving the judgment of the Privy Council, seemed to be influenced to some extent by the apparent unanimity of the writers, he very guardedly decided that "such a stamp imposed by the legislature is not direct taxation." I have no difficulty in conforming myself to

(1) 102 U. S. Rep. 586.

(2) 3 App. Cas. 1090; ante, vol. 1, p. 117.

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this *dictum*. It is precisely what we all held here. With regard to the other question decided in that case, name'y, whether license or not, it does not arise in this case.

We therefore come to the first point we have to decide, whether the tax now in question is within the ruling of the case of *Attorney General for Quebec v. Queen Insurance Co.* (1) or not, and if not, whether it is direct taxation within the meaning of the B. N. A. Act?

On the first part of this question there is hardly room for a difference of opinion. In the former case the tax was levied on any one who might insure. The present tax is on every Canadian bank, etc., doing business in the Province of Quebec, and the measure of the charge is the paid-up capital of the bank. There is also a business tax. At the argument the contention that the tax was not direct seemed ultimately to be confined to the consideration that it was not a tax on property within the province, or on the property of persons residing in the province, or even a tax on property, but [178] that it was a tax on the franchise. I presume that a tax on the franchise means a tax on those privileges which go to make up the corporation, and consequently it is a tax on the person. If the position be correct that any tax on the person, his property or his revenue is direct taxation, in the meaning of the B. N. A. Act, (and there is no decision contravening it) then a tax on the franchise of a corporation is a direct tax, for a corporation is a person. The law of this province lays down in express terms that "every corporation legally constituted is an artificial or ideal person . . . enjoying certain rights and liable to certain obligations (352 C. C.). They are also subject to certain disabilities. (364 C. C.) I understand that these articles express correctly the law of England on this subject as well as our law. Smith's Mercantile Law, chap. 4. There is certainly nothing in our law which could possibly suggest the idea that a corporation might not be made liable to a personal tax, and assuming the law of England to be the same, I am forced to the conclusion that a tax on the person, or on the franchise of a corporation, is no exception to the general rule of sub-sect. 2, sect. 92. Of course in the United States a tax on the franchise could not be direct taxation within their constitution; because it could

(1) 3 App. Cas. 1090; *ante*, vol. 1, p. 117.

not be adjusted according to the census. And this explains the case of *Bank of Commerce v. New York*; (1) and also, I presume, the case mentioned by Hilliard (Law of taxation, ch. 1, par. 36, p. 20), *Coite v Connecticut Mutual Life Ins. Co.* (2), which I have not seen. What I understand to be laid down by these cases is this: A tax on nominal value is not a tax on property, for evidently since the tax is imposed on the nominal value its quality as property is disregarded; it is therefore a tax on the franchise which cannot be adjusted. But said Mr. Justice Nelson, a tax on the estimated value is a tax upon property, and consequently is direct taxation. As to the tax in question not being a tax on property, the statute (45 Vict. c. 22, Q.) does not impose it as a tax on property, but as a tax on banks, etc., carrying on business in the [179] province. Then by sect. 3, it regulates how each of these ideal persons shall be charged. Here it is necessary to distinguish the cases, and first I shall deal with banks. They are to pay not on the nominal value of their capital, but on their paid-up capital. Now, if it be maintained that this tax is not a tax on the person, I do not see how it can be maintained that it is not a tax on property. There is nothing in our constitution which declares anything as to uniformity of taxation, and, therefore, it is no legal objection to a tax that is not levied upon any general system of valuation. The power to assess being admitted, its measure is a matter of discretion subject to the power of disallowance by the Dominion government. It is not a legal question.

The next point is that it was not taxation of persons within the jurisdiction of the legislature of Quebec. This difficulty does not appear to me to be formidable. The persons taxed are not the shareholders but the banks or other corporations. The shareholder is never by law confounded with the ideal person, so he can sue the corporation like any other stranger. Smith's Mercantile Law, *loc. cit.* There is nothing in paragraph 2, sect. 92, to confine the tax to persons domiciled in the province. What the statute says is that the taxation must be within the province, or, in other words, that the provincial government cannot execute its laws beyond its jurisdiction. It scarcely required the words "within the province" to establish this. It is said by Field, J., in *Railroad Co v.*

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(1) 2 Black, 620.

(2) 36 Conn. 512.

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Pennsylvania (1) : "The power of taxation . . . is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." The statute does not propose to tax persons outside the province, but persons carrying on business within it and benefiting by its organization and government. It is an evident error to say that a person is only liable to the laws of his domicile. By his acts he may make himself personally liable to the laws of many countries without ever leaving the place of his birth. A Frenchman who has never been out of Paris might become liable to a business tax in Montreal, and I dare say that such an [180] impost could be collected as any other debt in the French courts. If an individual be thus liable why should a corporation escape a similar liability ?

The last point is that the property is not within the province. This difficulty is more substantial, and if the tax were not also personal I would be inclined to think it [in]valid as regards banks not having their domicile in Quebec, unless it were shown that their stock was there ; but as I have already said the tax appears to me to be personal and to be of the most direct kind, and therefore the question does not affect the cases before us. As to those having their principal place of business in the province of Quebec, the question could not arise on any supposition.

Again as to the argument that a business tax is not direct, I see nothing in that either in principle or in practice. It is notoriously false in principle that a tax on a profession or on a trade or on wages necessarily comes out of the pocket of the employer or the consumer. It stands on the same footing as a tax on profits, and profits are income, and a tax on income is direct taxation. See Say, *Cours d'Economie Politique*, T. 5, p. 420, where the result of taxing industries and wages is clearly treated. It will be observed that there are two distinct taxes on the banks, one on the person or on the franchise ; the other a purely business tax. The taxes on insurance companies are purely business taxes. Incorporated companies for carrying on some trade, etc., are charged with a personal tax to be increased according to the amount of paid-up capital over \$250,000 and an additional tax for each place of business. These cover all the descriptions of corporations that have come before this

(1) 15 Wallace, 300, 319.

court, and I think all the taxes they complain of are within the category of direct taxation. I have not referred to the question of excise, although Mr. Justice Taschereau, the ingenious originator of the numerous fallacies I feel myself called upon to combat, has drawn it into the medley. His error here is very easy of exposition. [181] He has written on a mutilated text, at least as it is given in Cartwright, p. 141. (1). The full text of what Wharton says is this: "Excise, the name given to the duties or taxes laid on certain articles produced and consumed at home; but exclusive of these, the duties on licenses, auctioneers and post-horses are also placed under the management of the excise, and are consequently included in the excise duties."—Wharton's Law Lexicon *vo.* Excise. To bring Mr. Justice Taschereau's logic into line we should have to say: Excise duties are direct taxes; certain duties not excise are collected by the exciseman; therefore they are direct taxes. Really the functions of the gauger, as he was irreverently called formerly, owing to the ordinary operations of his calling, have been extended; but that does not alter the nature of direct taxation, nor the meaning of the term in the B. N. A. Act. The argument of the learned Chief Justice differs notably from that of Mr. Justice Taschereau. He does not go on the strict definition of excise; but he says, in legislation excise has been made to include assessed taxes. Therefore we must presume that excise, in the contemplation of parliament, includes all these taxes. If it had been our business to interpret the word excise, it might perhaps have been a consideration for us whether excise meant all the taxes collected by the exciseman. But the Act does not use the word "excise," except in a transitory clause, sect. 102, for certain taxes then imposed. It is not applied to the general power of taxation. It is the economists who say that excise duties are not direct taxes because they are similar to customs duties. To make it a rule of interpretation that because a particular word was used in a special sense in one statute, it should have the same interpretation in other statutes, having no relation to the same subject, would be the surest way of mistaking the intention of the legislature that could be devised.

(1) The passage quoted by Mr. Justice Taschereau in the case referred to is taken from the 6th edition of Wharton's Law Lexicon.

The words here printed in italics do not occur in the 6th or subsequent editions of that work.

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There is another view of this case which, it appears to me, merits closer attention than it has received, and that is whether the B. N. A. Act has limited the local powers of taxation to "direct taxation within the province in order to the raising of a revenue for provincial purposes," and to "shop, etc., and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes," and this to the exclusion of every other form of taxation. This enquiry demands an extended examination of the general scope or scheme of the B. N. A. Act. It has been said the local legislatures are not supreme legislatures. From a purely abstract point of view, no legislature is supreme. In other words, there are limits to jurisdiction, which are not identical with the physical power to execute. Public law is imperfect in this, that it has no constitutional power of execution ; nevertheless it expresses a right. When De Hardenberg exclaimed at the Council of Vienna ; "*Que fait ici le droit public ?*" Talleyrand replied : "*Il fait que vous y êtes.*" Again, jurisdiction has moral limits, for it has no authority over conscience. Akin to this limit is the non-assent of the subject, and so laws become obsolete. It is only, then, relatively, that we can speak of a supreme legislature. Thus restricted, the parliament of the United Kingdom is supreme as regards all the Queen's dominions. By force of that supremacy it granted the constitution to Canada set forth in the B. N. A. Act, 1867, and by the same power it has amended that Act. By the Act of 1867 and its amendments it has divided the powers of legislation between a federal legislature and local legislatures, in very different proportions. It is admitted that the local legislatures are as omnipotent within the scope of their legislative powers as the Dominion parliament is within its powers. It does not, however, follow from this that the federal organization has no supremacy over the local. Such a pretension would be utterly untenable, for the federal power, alone, has the power to nominate one of the branches of the local legislature, it can disallow its Acts, it can turn local works into federal works, and it can create new provinces. The true doctrine seems to me to be this, that the federal power is not generally supreme relatively to the local power. Its supremacy consists in its power to influence indirectly the action of the local power, or to paralyze [183] it to some extent, not in the power to destroy it. An indirect attempt to destroy it would therefore be unconstitutional and unlaw-

ful. It is likewise generally admitted, as has been already said, that the powers of the local legislatures are enumerated in the constitutional Acts, and by parity of reasoning it cannot be denied that the powers of the Dominion are also to be found there. Giving full effect to this principle, it must not, however, be supposed that it implies all the powers given by the constitutional Acts either to the Dominion parliament or to the local legislatures are specially enumerated. The general power given to the Queen, senate and house of commons is "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." But among the matters coming within the classes of subjects assigned exclusively to the legislatures of the provinces there are also general powers of legislation. They make laws as to "all matters of a merely local or private nature in the province." Does this not embrace local taxation for local objects? And if not, why? There can be no question, I think, that taxation is a necessary attribute of government. A government that cannot tax would be a nullity, and the fact is that it is a power conferred in some degree or other on the most insignificant municipality in the country. They can impose property and income taxes, insurance taxes of all sorts and a poll tax. The general power to tax to any extent has always been recognised in the United States as an attribute of sovereignty, and I do not think there can be any English authority found to contradict this proposition. "The power of congress to exercise exclusive jurisdiction in all cases whatsoever within the district of Columbia includes the power of taxing it:" *Loughborough v. Blake*. (1). "The power of taxing the people and their property is essential to the very existence of government:" *McCulloch v. Maryland* (2). This taxing power is an essential attribute of sovereignty, and can only be abridged by positive legislative enactment, clearly expressed. The [184] power is not affected by a charter which is silent on the subject: Hilliard, Law of taxation, ch. 1, par. 85, p. 40. In answer to a question I put at the argument upon this point, Mr. MacLaren said that sub-sects. 2 and 9 of sect. 92, were impliedly a dealing with the whole question of the taxing power, for if the local legislatures had full powers to tax, these two sub-sections would have.

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(1) 5 Wheaton, 317.

(2) 4 Wheaton, 316, 428.

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been unnecessary, and, therefore, the power to tax indirectly is impliedly taken away. This is a very ingenious argument, and the best, I fancy, which can be put forward, but I do not think it satisfactory. In the first place the rule of interpretation *inclusio unius, exclusio alterius* is one of the feeblest of the rules of interpretation, if it can be called a rule at all. The real rule is thus expressed by Pothier, No. 100: "Lorsque dans un contrat on a exprimé un cas, pour le doute qu'il aurait pu y avoir, si l'engagement qui résulte du contrat s'étendait à ce cas, on n'est pas censé par là avoir voulu restreindre l'étendue que cet engagement a de droit, à tous ceux qui ne sont pas exprimés." It is a rule of the Roman law: "Quæ dubitationis tollendæ causa, contractibus inferuntur, jura commune non lædunt." L. 81 Dig. de regulis Jur.; L. 55, Mand. I find it equally imperatively expressed in the English law. Coke says: "It is a maxim of the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law." And Lord Hatherley, summing up the opinion of Mr. Justice Blackburn in *Ashbury Railway Carriage and Iron Co. v. Riche* (1) says: "Then he (Mr. Justice Blackburn) cites passages from old authorities to show that when once you have given being to such a body as this, you must be taken to have given to it all the consequences of its being called into existence, unless by express negative words, you have restricted the operation of the acts of the being you have so created." There are numerous cases supporting this doctrine in different ways. For instance, this distinction has been made between using words that are unnecessary and using words that are unmeaning; the former is readily supposed, the latter is never presumed.—*Auchterarder v. Earl of Kinnoull* (2). Words that are, strictly speaking, unnecessary may be used *ex majore cautela*; *Duke of Newcastle v. Morris* (3), *Fryer v. Morland* (4). That is precisely what, I think, was done in this Act. The right to tax the person might have been questioned with much greater force than the right to tax indirectly, if nothing had been said. Besides this, there is a limitation in both sub-sections: sub-section 2 allows exclusively direct taxation in order to the raising a revenue for provincial purposes, and sub-section 9 authorizes

(1) L. R. 7 H. L. 653, 685.

(2) 6 C. and F. 646, 686.

(3) L. R. 4 H. L. 661, 671.

(4) 3 Ch. D. 675, 685.

legislation as to certain licenses in order to the raising a revenue for provincial, local or municipal purposes. In the third place it is, at all events, not an express exclusion of the general power to tax, which seems to be an inherent right of government; and in the fourth place, sub-section 16 covers any omission of the sort. To this I may add that if the arguments referred to were good in this case, the local legislatures could not legislate as to shops, saloons or taverns at all, except in regard to licenses, in order to raise revenue. This has never been pretended, and *Hodge v. The Queen* (1) is an authority to show that such a pretension would not be maintained, for what the legislature of Ontario did was to create license commissioners with power to pass resolutions to close taverns and billiard rooms at certain hours. In *Blouin v. The Corporation of Quebec* (2) Chief Justice Meredith gave a similar decision, as also in *Poulin v. The Corporation of Quebec* (3). The latter case was confirmed on appeal to this court, and also by the Supreme Court.

One other argument has been put forward, with some plausibility, to show that parliament never intended to give the local legislatures the right to tax indirectly. It was said that certain speakers in Canada, who spoke on the resolutions, had expressed the idea that the local governments were to live on direct taxation and on the federal subsidy. It is very true that in France commentators allow themselves great latitude in referring to the history of the code; but the discussions in the council of state and in the tri-
[186] bune were of a very different kind from the discussions of a popular body like the house of assembly; and I am not aware that any weight is attached in France to the opinions of individual members of the assembly. Nothing, however, is better established in England than this, that the debates in parliament are not authority as to the interpretation of statutes. The cases are systematically arranged in Mr. Hardcastle's very carefully prepared treatise on the construction and effect of Statutory Law, p. 55. If there be any difference between the French and English law on this point, which I am inclined to doubt, we must, of course, reject the French rule. In referring to the Acts of the legislature we express almost

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(1) 9 App. Cas. 117; *ante*, vol.
3, p. 144.

(2) 7 Quebec Law Rep. 18;
ante, vol. 2, p. 368.

(3) 9 Can. S. C. R. 185; 7 Quebec
Law Rep. 337; *ante*, vol.
3, p. 230.

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an excessive deference for them; but we compensate ourselves for this lip-loyalty to the words of the statute by disregarding totally the sayings of the individual legislator.

This line of argument necessarily leads us to examine the rules as to the interpretation of statutes, and to a short digression in order to ascertain the fundamental principles upon which the right to tax rests, if it exists at all. The difficulty of these rules appears to me to be a good deal over-rated. Their simplicity is so great the bookmakers can hardly find materials to make books about them. A statute, according to our ordinary use of the word, is an act of the legislature. Its dispositions are either clearly announced or their terms are ambiguous. In the former case they are to be applied according to their terms, the language being taken to have the meaning popularly attached to it. In delivering the judgment of the Privy Council in *McConnell v. Murphy* (1) Sir Montague Smith said: "In mercantile contracts, and indeed in all contracts where the meaning of language is to be determined by the court, the governing principle must be to ascertain the intention of the parties, through the words they have used. This principle is one of universal application." If the terms are ambiguous for any cause, whether it be from a vice of construction of a particular section, or from contradiction in the provisions of the statute, or from [187] incompatibility with the general meaning of the Act, or because literal application would lead to [such] an absurd conclusion as would frustrate the purposes of the Act, then interpretation begins, and it is sought thereby to arrive at the true intention of the legislature. It is not a question of adding to or taking away from the Act; but deciding what the Act really means. There are few legislative rules as to the mode of dealing with such difficulties; and also certain rules, derived from experience and reasoning, have been laid down as general guides in such matters; but the latter leave much to the discretion of the judges, because their delimitation is scarcely more extensive than each particular case. I think, however, it may be said, generally speaking, that in the interpretation of a statute *indicia* similar to those which guide us as to the intention of parties, in the absence of express declarations as to their intention, are applicable. Lord Blackburn has explained, with his usual breadth and precision, how the courts of law act in

(1) L. R. 5 P. C. 203, 218.

construing instruments in writing. He says: "A statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances which the person using them had in view." *River Wear Commissioners v. Adamson* (1). Another very great authority, Mr. Justice Hannen, has said: "I agree with Mr. Thesiger that an appeal can only be given by the clearly expressed intention of the legislature. This must be ascertained by an examination of the whole of the enactment which is the subject of inquiry. It is not necessary that there should be any particular form of words, but it is essential that an intention to give an appeal should clearly appear. . . .

"The authorities that have been cited have not much bearing upon this question, because in all cases the intention of the legislature must depend to a great extent upon the particular object of [183] the statute that has to be construed. I have come to the conclusion that the legislature intended to give an appeal in a case like the present." *Reg. v. Justices of Surrey*. (2)

Taking these authorities as expressing the general rules for the interpretation of statutes, and which seem to be identical with those which obtain in France (see *Her Majesty's Procureur v. Bruneau*,) (3) it can scarcely be questioned that the preamble of an Act is greatly to be considered in determining the intention of the legislature where there is any doubt as to the meaning of its terms. See also Menoch. de præsump. L. vi., Præs. 2 Nos. 2, 3, 4; and Comyns in his Dig. Vbo. Parliament, says:—"The preamble is a good means for collecting the intent."

Now, if we come to the preamble of the B. N. A. Act, 1867, we find the objects of the statute generally declared. The third paragraph is in these words:—"And whereas on the establishment of the Union by authority of Parliament, it is expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the executive government therein be declared." The Act then goes on to prescribe of what

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(1) 2 App. Cas. 743, 763.

(2) L. R. 5 Q. B. 87, 91, 93.

(3) L. R. 1 P. C. 169, 191.

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the executive of the central government shall consist, after that of what the legislature, called parliament, shall consist. It then follows the same form of legislation for the local constitutions.

It would seem then, beyond question, that this Act attributes plenary governmental powers with regard to certain matters to both the federal and local bodies, and so far as I know this has never been doubted. We have therefore one point settled. The local organizations are governments. They enjoy regalian powers, and all the incidents of such powers; and these powers have not been limited by the charter, which, although it has specially passed on the taxing power, has been silent as to the powers of indirect taxation. To the last part of this argument, that is to say, that the right to tax generally has not been expressly taken away, it has been said that by sub-sect. 3, sect. 91, "The exclusive authority of the Parliament of Canada extends to the raising of money by any mode or system of taxation," and it is further provided that "any matter coming within any of the classes of subjects enumerated in this section (i. e., sect. 91, of which taxation is one) shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces," and that this is an express and not an implied taking away of the general right to tax. This is a formidable position. To the federal parliament exclusive authority is attributed, and the exclusiveness so given overrides even the declaration attributing exclusive power to the local legislatures. That is, the exclusive power of the former is absolute, that of the latter is subject to the condition that it shall not clash with the former. It is not easy to conceive words more clear than those of the B. N. A. Act to express this idea, nevertheless it has been universally admitted that this interpretation cannot be put upon the statute. In the case of *L'Union St. Jacques v. Belisle*, (1) decided in 1874. Lord Selborne explained the necessity of reconciling the two enumerations. In 1877, in the case of *Attorney General for Quebec v. Queen Insurance Co.*, (2) I drew attention to this necessity in these words:—"It would be a defensible position to say that the proviso of section 91 so controlled sub-sections 2 and 9 of section 92 as to render them inapplicable,

(1) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

(2) 22 L. C. Jurist, 307; *ante*, vol. 1, p. 131.

although I do not think this was the intention of the Imperial Parliament. But the majority of the court does not adopt that view . . . The whole that the judgment about to be rendered affirms is, that the particular mode of levying a license adopted in the statute before us is beyond the powers of the Local Legislature," and, as I have already shown, it is that alone the Privy Council held in confirming the judgment of this court. They, therefore, impliedly rejected the short way out of the difficulty now suggested, as inadmissible.

[190] Later, in 1880, in the case of *Dobie v. The Temporalities Board*, (1) I argued that sect. 92 must be read with sect. 91, so as to modify the generality of sub-sect. "13, Property and civil rights in the province." The judgment of this court was reversed in the sense of the dissent, and no disapprobation of this doctrine was expressed. The following year the Privy Council in the case of *Citizens Insurance Co. v. Parsons*, (2) by a similar process of reasoning, restrained the generality of sect. 91, sub-sect. 2, "The regulation of trade and commerce," in order to give scope to the local power over property and civil rights, and *L'Union St. Jacques v. Belisle* (3) and *Cushing v. Dupuy* (4) were referred to as being in the same sense. Furthermore, the Privy Council enunciated the doctrine of progressive interpretation, to which I have already alluded in this opinion. To this it is answered—true so far, a general power will be restrained to give scope to a special power. This distinction does not meet the cases. In the case last mentioned, two powers, general and exclusive, one attributed by sect. 91, the other by sect. 92, somewhat in conflict, were compelled to live together. In *Cushing v. Dupuy*, (4) it was a conflict of powers equally general.

Palpably the double enumeration enacted for "greater certainty" is a faulty construction, and it becomes necessary for us, to carry out the intention of the legislature, to find a *modus vivendi*. We are not to construe the statute so as to make our institutions impossible; we are not to lay down a rule which "followed up to its consequences would go very far to destroy that power (the provin-

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(1) 7 App. Cas. 136; *ante*, vol. 1, p. 351.

(2) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

(3) L. R. 6 P. C. 31; *ante*, vol. 1, p. 63.

(4) 5 App. Cas. 409; *ante*, vol. 1, p. 252.

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cial) in all cases," as Lord Selborne has said : *L'Union St. Jacques v. Belisle* (1). This must be the language of every jurist; and it is thus the great judges of the United States have dealt with their constitution. As an instance, in the case already cited of *Hylton v. United States*, (2) Chase, J., said :—"The rule of apportionment (an express rule of the constitution) is only to be adopted in such cases where it can reasonably apply." I shall make four quotations from the case of the *Citizens' Insurance Co. v. Parsons* (3), to show that the Privy Council has used the same freedom of interpretation, and has held that, in spite of the absolute form of sects. 91 and 92, the courts will read them together, and modify one or the other or both, to meet the general requirements of the Act, and to attain the ends parliament must be supposed to have had in view :—

"But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the provincial legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in sect. 91."

"Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament."

"It could not have been the intention that a conflict should exist, and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other."

"It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not, by necessary implication or reasonable intendment, be modified and limited."

But it may be still further urged that the majority of the court

(1) L. R. 6 P. C. 31, 37; *ante*,
 vol. 1, pp. 63, 71.

(2) 3 Dallas, 171, 174.

(3) 7 App. Cas. 96, 107-110; *ante*,
 vol. 1, pp. 265, 271-274.

is endeavouring to restrain the particular power of sub-sect. 3, sect. 91, by the general sub-sect. 16 of sect. 92. To this I answer, that it is not the generality of the terms in which a power is conveyed that decides as to its nature ; so in *L'Union St. Jacques v. Belisle*, (1) it was the general sub-sect. 16 of sect. 92 that qualified and restrained sub-sect. "21, Bankruptcy and insolvency," precisely as the court does in this instance. "Clearly this matter is private; clearly it is local, etc.," said Lord Selborne; and therefore it is a power given to the local legislatures. I need hardly add that the court does not contend that sub-sect. 16 could prevail if it were incompatible with sub-sect. 3. But this it cannot be, unless we hold that there cannot be double taxation, which is untenable: [192] *Bemis v. Board of Aldermen of Boston*, (2). Besides, the power of double taxation is expressly recognised by the Act.

On the main question, as to whether there is any other power to tax except by way of license than that set forth in sub-sect. 2, the case of *Dow v. Black*, (3) seems to furnish direct authority. Sir James Colvile, in pronouncing the judgment of the Privy Council said:—"Their lordships are further of opinion with Mr. Justice Fisher, the dissentient judge in the Supreme Court, that the Act in question, even if it did not fall within the 2nd article (of sect. 92), would clearly be a law relating to a matter of a *merely local or private nature* within the reading of the 9th article of sect. 92 of the Imperial Statute." It is evident the learned judge meant the 16th article of sect. 92, for he had just declared that article 9 had "obviously no bearing on the present question." Again, the words "of a merely local or private nature," are not used in article 9, they are used in article 16 and in no other part of sect. 92. And lastly, if this is not enough, to agree with Mr. Justice Fisher, article 16 must have been intended, for that learned judge said:—"It also appears to me that the Act 33 Vict., c. 47, comes within the category of powers provided for in the 16th clause of the 92nd sect. of the B. N. A. Act, 1867, being purely a matter of a local nature." It seems to me then, that it is safe to say that *Dow v. Black* (3) lays down the principle as formally as it can be laid down (barring only the slip as to the number of the sub-section), that the

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(1) L. R. 6 P. C. 31; *ante*, vol.
1, p. 63.

(2) 14 Allen, 368.

(3) L. R. 6 P. C. 272; *ante*, vol.
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sub-sects. 2 and 9 do not exclude from the powers of the local legislatures the right to propose other forms of taxation.

The learned Chief Justice has referred to the case of *Dow v. Black* (1) as though it were an *obiter dictum*. It is true it was not necessary for their lordships to speak of this, but it was scarcely *obiter*, for it was before them, and it had formed a ground of dissent in the court below.

While the argument in this case was going on, we learned by telegraph that the Privy Council had confirmed the decision of the Supreme Court in *Attorney General of Quebec v. Reed* (2) I have [193] not been able to see what their lordships said in that case, except through the medium of newspaper reports, from which I am not disposed to take the decision, inasmuch as it is usual for the Privy Council to submit a report in writing, which lays down precise propositions. And, in any case, the report, such as we have it, does not affect my opinion in this case. If the ten cents tax was a tax at all, it was not direct taxation, within the meaning of the B. N. A. Act. In Mr. J. S. Mill's opinion, its character would only be determined with the end of the litigation, and when it was decided who should pay the costs of filing the exhibit. I am not, however, of the opinion that the *jus edicendi* which the Chief Justice of the Supreme Court seems to think is possessed by courts, can possibly go to the extent of compelling us to accept as an admitted truth the so-called science of political economy or the theories of Mr. Mill, and lest my indocility to accept such doctrines may appear presumptuous, I shall quote two paragraphs from Mr. Jevons, "Theory of Political Economy," one from the preface, (p. v.) the other the concluding sentence of the work (p. 265) dealing with Mr. Mill's claims to be considered as the high priest and prophet of political economy, and with the so-called science as known :

"The contents of the following pages can hardly meet with ready acceptance among those who regard the science of political economy as having already acquired a nearly perfect form. I believe it is generally supposed that Adam Smith laid the foundations of this science ; that Malthus, Anderson and Senior added important doctrines ; that Ricardo systematised the whole ; and finally that Mr.

J. S. Mill filled in the details and completely expounded this branch of knowledge. Mr. Mill appears to have had similar notions ; for he distinctly asserts that there was nothing in the laws of value which remained for himself or any future writer to clear up. Doubtless it is difficult to help feeling that opinions adopted and confirmed by such eminent men have much weight of probability in their favour. Yet, in the other sciences this weight of authority has not been allowed to restrict the free examination of new opinions and theories ; and it has often been ultimately proved that the authority was on the wrong side."

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"THE NOXIOUS INFLUENCE OF AUTHORITY.

"I have but a few lines more to add. I have ventured in the preceding pages to call in question not a few of the favourite doctrines of economists. To me it is far more pleasant to agree than to differ ; but it is impossible that he who has any regard for truth can long avoid protesting against doctrines which seem to him erroneous. There is ever a tendency of a most hurtful kind to allow opinions to crystalise into creeds. Especially does this tendency manifest itself when some eminent author, with the power of clear and comprehensive exposition, becomes recognised as an authority on the subject. His works may possibly be far the best which are extant ; they may combine more truth with less error than we can elsewhere find. But any man must err, and the best works should ever be open to criticism. If, instead of welcoming inquiry and criticism, the admirers of a great author accept his writings as authoritative, both in their excellences and defects, the most serious injury is done to truth. In matters of philosophy and science authority has ever been the great opponent of truth. A despotic calm is the triumph of error ; in the republic of the sciences sedition and even anarchy are commendable."

In the *Attorney General of Quebec v. Reed* (1) I do not learn from the report I have seen that the decision of the Privy Council in *Dow v. Black* (2) has been distinctly overruled. Until this is done in precise terms I shall continue to hold that the local legislatures may impose taxation by other modes than those set forth in sub-sects. 2 and 9 of sect. 92. In arriving at this conclusion I am satisfied to

(1) 10 App. Cas. 141 ; *ante*, vol. 3, p. 190.

(2) L. R. 6 P. C. 272 ; *ante*, vol. 1. p. 95.

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think that the most submissive case-lawyer could not confine himself more completely within his self-constituted prison than the majority of this court has confined itself within the bounds of precedent. Of course, I do not count the case of *Serern v. The Queen* (1). If we were to be bound by it, nothing could be said on the right to tax indirectly ; but it is only the decision of an intermediate Court of Appeal, and in a matter of this kind it cannot be considered conclusive. It is also pleasing to know that in a great part of the judgment there is unanimity in this court. We all reject the pretended scientific meaning of direct taxation, and this, I hope, will check the objectionable practice of reading books that are not authority in court. Where we differ is as to the nature of the tax and as to the power of the local legislature to collect indirect taxes. I have not alluded to the argument of the possible abuse of the taxing power. We constantly hear it said, if the local legislatures have all powers of taxation they may destroy trade and commerce, [195] and so forth. There is some truth in this. The folly of killing the hen that lays the golden eggs is not a new idea to the world. However, the presumption is that the institutions of government tend to enrich and not to impoverish the subject. Very extreme cases may come up, which, under the principles I have endeavoured to explain, and which I understand to be those sanctioned by the Privy Council, will give rise to distinctions with which the courts will have to deal. But in any case, the simple abuse of the power to tax can always be checked by the power to disallow possessed by the federal authority.

We are to maintain the taxes in all the cases, and consequently the judgments in the five bank cases will be reversed, and in the four other cases the judgments will be confirmed.

BABY, J. :—

At this late hour of the day, within a few minutes of the time fixed for the adjournment it would be an *hors d'œuvre* on my part to attempt giving my opinion at full length on the very important questions at issue, and which have been so thoroughly ventilated by my learned colleagues. It would almost suffice for me to say that I share generally in the opinions so ably enunciated by my learned brothers, Justices Ramsay and Tessier.

(1) 2 Can. S. C. R. 70 ; *ante*, vol. 1, p. 414.

Nevertheless, I may add that my judgment rests principally on two points which have been brought out most conspicuously in the course of the discussion :—

1st, That this is a direct tax.

2nd, That, whatever the name by which it may be called, direct or indirect, the Legislature of the Province of Quebec had the power of imposing it within the Province, for local purposes.

In the first place, I say that the tax complained of here is a direct tax, according to what is generally meant and understood in Canada by that term, and as I have always understood it when dealing with such a distinction in our system of taxation. I have not failed to make a careful examination of the numerous [196] authorities quoted by counsel on both sides as to the classification into direct and indirect taxes. They all vary more or less, according to the country in which they were written, or the particular school of political economy their authors represent. It would be an unnecessary task for me to review them now ; it would be merely going over much of the ground already traversed by the learned judges, and be a repetition which could not even have the pretext of throwing a spark of light on the subject, as all seem to concur in the inapplicability of the doctrines of political economists in dealing with the matter before us.

By the statute sought to be set aside as being *ultra vires*, the tax in question is imposed directly on the banks and other institutions therein named carrying on business within the Province of Quebec. They are all incorporated bodies for the most part, holding their powers either under federal or local legislation. Considerable efforts have been made to establish indiscriminately that no corporation of this kind could be directly taxed in its person. Now, if an ordinary person can be so taxed, I fail to see why a corporation could not be taxed in the like manner, as, by our law, every corporation is a person (C. C. Art. 352).

It was argued in this respect that the tax in question might fall on foreigners or on capital owned totally or in part by persons residing out of the Province of Quebec, and, therefore, it was not taxation “ within the Province.” This was followed up by another objection, viz : that the impost complained of was put on a capital that might not be found within the limits of the Province, in other words, that a foreign bank carrying on its operations in Quebec

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had, most likely, but a very small proportion of its capital engaged here, that it might, therefore, be taxed elsewhere, and the consequence would be that the same capital might be taxed several times over.

There is not much force, I think, in these two objections. In the first place, these corporations have their legal domicile within the Province, and from the moment they have taken it up, they become undoubtedly amenable to its laws; and, in the second [197] place, wherever a bank or like institution opens business, it must be readily admitted that it does so in its corporate name and as a whole; it is the corporation that acts and not a certain number of shareholders or a proportion of them, according to the amount of capital invested.

On the second point, I say that, even should this tax be not a direct one, the Legislature of Quebec had the right of imposing it in the exercise of one of its inherent powers. A people can undoubtedly tax itself through its legislators in parliament assembled. Now, by the B. N. A. Act, 1867, the several Provinces forming "The Dominion of Canada," at their own request, have been granted respectively a legislature with certain enumerated powers. The general powers of taxation cannot be impliedly taken away from them. It requires an express and clear enactment of the law to deprive them of what is a primary right. There is nothing of the kind, however, in the Act, which should be liberally interpreted, that is to say, in the same sense and spirit as it was framed and granted to us by the Imperial Parliament. Doing otherwise, would be taking to pieces and breaking up this great treaty, made and entered into between the various British North American Provinces, under the sanction and for the welfare of the empire.

I am of opinion that the local legislatures alone and exclusively have the right of imposing direct imposts within their respective provinces, to raise a revenue for provincial purposes, but this right given by the 92nd clause of the B. N. A. Act, 1867, does not imply any abandonment by them of all other rights of taxation, or a prohibition to them to levy money by any other mode or system of taxation within the province and for provincial ends. In other words, I read clauses 91 and 92 of said Act—which have certainly to be reconciled—as giving to the Dominion or federal legislature

the power of raising money by any mode or system of taxation except provincial taxation for provincial objects, which is the right reserved to and conferred specially and exclusively on the [198] local legislatures, but at the same time, not depriving in any way the latter from exercising the right of taxing generally, for the objects for which they were created, and which has not been taken away from them expressly or impliedly.

I am aware that this interpretation of the statute has not been accepted in certain quarters, but I cannot see—to be practical—how any other can be given.

It has also been stated that this is an excise tax and, therefore, did not fall within the jurisdiction of the local legislature. I fail to see how it can be construed into such a tax. By excise is generally understood the impost put on the home products, manufactured or otherwise. The taxes put on spirits, tobacco, malt, flour, coal, have always been considered as excise duties in Canada and no other kind of tax. The very name signifies this. There is no parity here.

We have it said this tax is inopportune, unreasonable, unjust. Whether it be so or the reverse is not for this Court to decide—that is the political side of the question and not the legal. The tax may be perfectly legal on the one hand, and quite inopportune on the other. It rests then with the people to decide, by their representatives in parliament, whether it should be abrogated or not. I hold, moreover, that it does not fall within our domain to set aside a tax imposed by a proper authority because the same may happen to clash—some day or other—with the powers of taxation appertaining to another branch of our political organization.

On the whole, I am for confirming the judgments which maintain the taxes and to reverse those which set them aside.

The following are the *considérants* applicable to each of the nine cases :—

“ The Court, etc.,

“ Considering that the taxes complained of in this cause were and are imposed by a statute of the Legislature of the Province of Quebec, passed in the forty-fifth year of Her Majesty's reign, and being numbered Chapter 22 of the statutes of the said year ;

[199] “ And considering that the said Legislature had power to impose the said duties, inasmuch as the said taxes are direct taxes

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within the Province, and were imposed in order to raise a revenue for provincial purposes ;

“ And considering furthermore that, even assuming the said taxes should be considered as not falling within the denomination of direct taxes, the said Legislature had power to impose the same, inasmuch as the said taxes were matters of a merely local or private nature in the Province.”

Judgment reversed in the five appeals by the License Inspector, and confirmed in the four appeals by corporations.

JUDGMENT OF THE SUPERIOR COURT.

[*Translation of report in Montreal Law Rep. 1 S. C. 32.*]

JETTÉ, J.:—

In 1882, the Legislature of this Province enacted, “ with the object of providing for the needs of the public service,” the imposition of certain taxes on banks, and on assurance, telegraph, railway companies, etc. The law passed for this purpose is intituled : “ Act to impose certain direct taxes on certain commercial corporations,” (45 Vict. c. 22), and its principal provisions, so far as they affect the cases now submitted to this Court, may be summed up as follows :

The first section of this law declares that every insurance company accepting risks and transacting the business of insurance in this Province shall pay yearly the different taxes mentioned in section 3.

The second section subjects to taxation life, fire, inland and ocean marine, guarantee and accident insurance companies ; but excepts therefrom mutual insurance companies organized under the laws of this Province.

The third section assesses the tax as follows :—

	A company of insurance on life only	\$500
	Every other insurance company having only a single place of business.....	400
[33]	For each additional branch, including life insurance	50
	For each office at Montreal and at Quebec	100
	For each office in any other locality	5

Lastly, by sections 4, 5 and 6 it is enacted that this tax shall be payable the first juridical day of the month of July in each year to the license inspector of the revenue district in which the company has its head office, and if it has not such head office in the Province, then to the inspector of the revenue district of Quebec ; and these officers are authorized to sue in their own names for all sums payable by virtue of this law.

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The defendant, a life and fire insurance company having an office at Montreal, comes then under the operation of this law, and the plaintiff, inspector of licenses for that district, demands from it its proportion of this tax, amounting to a sum total of \$550.

The defendant company has pleaded to this claim by two exceptions.

By the first, it maintains that the law relied on has no legal existence, and should be considered as null and void, inasmuch as it has been passed in the name of Her Majesty the Queen, who forms no part of the Quebec Legislature, and has no legislative authority in that Province.

By the second exception the defendant asserts that if this law has any legal existence whatever, it is unconstitutional and is unable to affect this company for different reasons which may be summed up as follows :—

1 and 7. Because this company has not been incorporated by the Provincial Legislature, and is duly licensed to exercise its rights as an assurance company by the federal government, in virtue of the federal statutes of 1875 and 1877, relating to assurances ;

2. Because the tax demanded is not a direct tax ;

3, 4 and 5. Because this tax is only imposed on certain classes of the population ; that it is levied only on commercial corporations [84] and not on goods ; and that it does not fall within any of the classes of taxes which the Legislature has the right of enacting ;

6. Because this tax constitutes a regulation of commerce ;

8. Lastly, because this tax is in the nature of a license.

In order to present with more conciseness the questions which this litigation really raises, I put aside the contention raised by the first exception of the defendant, that the law relied on has no legal existence inasmuch as it has been passed in the name of Her Majesty who has no legislative power in this Province. Mr.

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Justice Papineau, in the case of *Molson v. Chapleau* (1) has dealt with that contention with a vigour of reasoning which relieves me from adding anything to what my honourable colleague has said on that point. I shall content myself with referring besides to Todd on Parliamentary Government in the British Colonies, pp. 329, 369, 392, 394 and 398, where the falsity of this contention is clearly established.

Coming now to the questions raised by the second exception of the defendant, I reduce them to two main ones on which the counsel for the parties have specially insisted, and which virtually include all the others, viz.:—

1. Is the tax demanded direct or indirect?
2. If it is a direct tax, does it constitute a regulation of trade?

It is by the light of sects. 91 and 92 of the constitutional Act of 1867 that these questions ought to be studied, and they cannot be properly answered except by determining the sense and exact scope of these two provisions of the Imperial Act. This study which is thus imposed on this Court would constitute, under any circumstances, a very difficult task, but this task becomes altogether more delicate and difficult in view of the widely different opinions expressed by the number of eminent judges and distinguished [35] lawyers who have already had to consider these same provisions. I am, moreover, not tempted to widen the tract that I have to traverse, and everything invites me on the contrary to follow the wise advice which the Lords of the Privy Council give us in the case of *Citizens' Insurance Co. v. Parsons* (2) when speaking of the duty imposed on the Courts of interpreting these two sections of our constitutional Act and harmonizing their provisions, they add:—"In performing this difficult duty it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."

It is then within these strict limits that I shall estimate the questions raised in the cases now submitted to me:—

1. Is the tax demanded direct or indirect?

On this first point the jurisprudence of the courts of the United

(1) 6 Legal News, 222; *ante*, vol. 3, p. 360.

(2) 7 App. Cas. 96; *ante*, vol. 1, p. 265.

States has been often cited as fixing and determining the sense of these words "direct tax." In spite of the respect which these remarkable decisions ought to inspire everywhere I do not hesitate to say that they are altogether inapplicable to our state of things. How, in fact, could we accept as a rule of interpretation this jurisprudence interpretative of the American constitution since it is sufficient to contrast the respective provisions of the two constitutions on the subject of this direct tax to bring out the essential differences?

Section 92 of the Imperial statute of 1867 says purely and simply, that the provinces of the Canadian Confederation have the right of raising a revenue by direct taxation; and that without restriction or limitation in the absolute sense of these words "direct taxation."

On the other hand, if we refer to the constitution of the United States, far from finding there so simple and clear a provision we find that direct taxation can only be imposed by the Federal Government, dividing it between the different states according to [36] the respective number of their inhabitants; and that this number should be "determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." Article 1, sec. 2, sub-sec. 3, and sec. 9, sub-sec. 4.

Now, what is the meaning of this provision? It is a recognised fact that it was desired by this to guarantee the Southern States, which had a numerous slave population, against the injustice of a capitation tax which, if imposed uniformly, would have weighed unfairly on the white population of those states, and to attain this object it has been thought right to exempt from such tax two-fifths of the slave population in order to equalize thus the burden which should fall on the white population of all the states.

How, in view of such provisions, ought the American courts to interpret the words "direct taxation?" Evidently in the restricted sense given to them in the constitution, that is to say, that no tax should be considered as direct unless it was divided among all the states according to the population of each, reckoning that population in the manner above described, that is to say, leaving out two-fifths of the slave population.

Thus Chief Justice Chase came to the conclusion in the case of

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Veazie Bank v. Fenno (1) that there could only be, according to the American constitution, two direct taxes—that on immovables and a capitation tax. “It may be rightly affirmed, therefore, that in the practical construction of the constitution by Congress direct taxes have been limited to taxes on land and appurtenances, and taxes on polls or capitation taxes.”

And Cooley, on taxation, makes at page 5, note 2, the following citation: “The term ‘direct taxes’ is employed in a *peculiar sense* in the Federal constitution, in the provision requiring such taxes to be apportioned according to representation, and they are perhaps limited to *capitation and land taxes*.” Lastly, Kent, volume I., [37] page 255, says: “The constitution contemplated no taxes as direct taxes but such as Congress could lay in proportion to the census.”

It follows then clearly from some preceding observations that it is impossible to require from this American jurisprudence, established under the authority of special and exceptional regulations, a rule of interpretation for the very different clause which our own constitution contains.

Section 92 of the Statute of 1867, as we have said, declares simply that the Provinces shall be able to raise a revenue by means of direct taxation. These words then are used here without conditions or restrictions and in their proper and absolute sense. And in order to determine this sense it is sufficient to have recourse to the rules which the political economists give us, rules thoroughly accepted and recognised at the time when the constitutional agreement which we have now to interpret was concluded between the Provinces and approved by the Imperial authority.

Now all the economists agree in dividing taxation into direct and indirect. It is true that the same unanimity does not exist between them when it is a question of giving a precise definition of each of these two classes of taxation and a rigorous classification of the taxes which ought to enter into one or other of these classes. Nevertheless we find in the general rules accepted by the best known writers sufficient uniformity and agreement to deduce from them the solution of the question which we are examining.

Monsieur Leroy-Beaulieu, in his treatise on the science of finance, volume 1, page 214, after having shewn that the definition of direct

(1) 8 Wallace, 533, 544.

and indirect taxes given by the government in different countries is not always exact, offers the following as being the most scientific and satisfactory that he has been able to find :—

“ Par l'*impôt direct* le législateur se propose d'atteindre immédiatement, du premier bond et proportionnellement à sa fortune ou à ses revenus, le véritable contribuable : il supprime donc tout inter-
[38] médiaire entre lui et le fisc, et il cherche une proportionnalité rigoureuse de l'impôt à la fortune ou aux facultés.

“ Par l'*impôt indirect* le législateur ne vise pas immédiatement le véritable contribuable et ne cherche pas à lui imposer une charge strictement proportionnelle à ses facultés ; il ne se propose d'atteindre le vrai contribuable que par ricochet, par contre-coup, par répercussion ; il met des intermédiaires entre lui et le fisc, et renonce à une stricte proportionnalité de l'impôt dans les cas particuliers, se contentant d'une proportionnalité relative en général.”

Monsieur Passy, who furnished to the Dictionary of Political Economy published by Messrs. Coquelin and Guillaumin the article on taxation, says also :—

“ C'est un usage reçu de diviser les impôts en deux catégories distinctes. On appelle *directs* ceux que les contribuables acquittent eux-mêmes pour leur propre compte ; on appelle *indirects* ceux dont certains d'entre eux ne font que l'avance et dont ils obtiennent le remboursement des mains d'autres personnes.”

Mill, Principles of Political Economy, book 5, chapter 8, section 1, says :—

“ Taxes are either *direct* or *indirect*. A *direct tax* is one which is demanded from the very persons who, it is intended or desired should pay it. *Indirect taxes* are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another ; such are the *excise* or *customs*.”

Walker, Science of Wealth, page 338 :—

“ A *direct tax* is demanded of the person who it is intended shall pay it. *Indirect taxes* are demanded from one person in the expectation that he will indemnify himself at the expense of others.”

Such is the system most generally adopted at the present day.

The matter can be summed up shortly : it is on the incidence of the tax that its classification depends. If the tax affects the very person who is to sustain it it is *direct* ; if on the contrary the person
[39] who pays the tax is to indemnify himself at the expense of others the tax is *indirect*.

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Let us observe, however, before going further, in what elastic terms this rule of classification of taxes is enunciated. The economists do not say that a direct tax is only that which the payer shall not be able in any manner to recover from another person—but simply that by means of which the payer is reached directly and without any one intervening, says Leroy-Beaulieu: "One which is demanded from the very persons who it is intended or desired should pay it," says Mill. And even though the payer should be able definitively to recover by throwing the tax on another, this would not change the nature of the tax which will remain always what the received rule makes it a direct tax.

Thus the land tax is by general consent, and even according to the point of view of American jurisprudence, a direct tax. Nevertheless it may happen that if the owner does not himself occupy his property he may succeed in throwing this tax on the tenant.

In like manner the customs duties should of necessity be placed in the class of *indirect* taxes. However, if the consumer imports himself the things which he needs it is evident that for him the tax becomes *direct*, since he pays it without intervention.

Nevertheless, neither in the one case nor in the other could we attempt to change the accepted classification since these accidents could not take away from the tax its true character from the point of view of legislation and political economy.

This basis established, let us see now how the economists proceed to the classification of the different recognised taxes in each of these two classes. None give us, without doubt, a rigorous and uniform classification, and the reason of it is easy to understand. In the United States a special and exceptional rule prevails; in France, in England and in other countries the idea has not yet been formed of a system where the grants of public powers are divided and afterwards limited as they are in our constitution. The list did not present then any interest, and it was sufficient for economists to lay down the principle for determining what should be understood by a direct tax and what by an indirect without counting those which enter into one or other of these two classes. Some, however, of the French economists have made this enumeration, and though the English writers have not entered into this detail as the basis on which the division rests is accepted by them, the classification of the French economists should be received as having the authority of all the writers whom we have cited.

Passy, in his article on taxation (Dictionary of Political Economy), says :—

The number of taxes classed under the title of direct taxes is very considerable. Those which it is necessary to mention are : 1. Taxes on persons. 2. On land. 3. On houses and buildings. 4. On the exercise of professions. 5. On incomes. 6. On transfers by succession or gift. 7. On assignments for valuable consideration. 8. The stamp tax on commercial effects.

“Indirect taxes form two distinct classes. The first consists of taxes levied on the products of the country before the moment of their consumption, and is called excise ; the second consists of taxes levied on the frontiers, either on foreign products destined for the interior markets, or on national products exported to other countries, and is named customs.”

Monsieur Leroy-Beaulieu, first volume, also gives us as direct taxes those on : 1. Persons (p. 272). 2. Land (p. 288). 3. Houses and buildings (pp. 301, 336). 4. The exercise of professions (pp. 373, 390, 395, 399). 5. Rents (p. 355). 6. Income (p. 423).

But he places among indirect taxes the tax on successions and the stamp tax (p. 480).

[41] Thus these two authorities agree in saying that the tax on the exercise of the professions is a direct tax. And by tax on the exercise of the professions is meant not only the taxing of the liberal professions, but that also of the industrial and commercial profits of all kinds.

Now, the tax which is demanded here from the defendant company has evidently this range and character. The first section of the law declares that “every assurance company accepting risks and doing assurance business in this Province . . . shall pay annually the different taxes mentioned in section 3.”

The tax demanded has then been imposed by reason of the exercise of the profession, the industry, or the business of the defendant company. And as this tax (which would be called in France a “license tax” [impôt des patentes], and in the United States, “business tax” [taxe d'affaires], is demanded directly from the companies taxed, and the intention of the legislator is evidently to reach these companies at the first bound, immediately and without intervention, we must conclude, according to the rules accepted by political economists, that this tax is unquestionably within the meaning of our constitution a direct tax.

For it cannot be disputed that to reach a sound interpretation of our constitution we must here, as in the interpretation of our

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ordinary contracts, seek above all the meaning which must have been intended by the representatives of the confederated provinces.

Now, is it not evident that in using these terms, direct tax, without restriction or limitation the statesmen who drew up our constitution intended to give them the meaning accepted in all countries in which the study of political economy is required from all those who are occupied with legislation and government?

There is no doubt that in employing these terms and using these expressions the framers of our constitution intended to restrict the power of the provincial legislatures, and to impose on them a possibly wise restraint for the protection of those under their government. All the economists agree in effect in recognising that the people bear much more easily indirect than direct taxes, because they scarcely perceive the former, while the other are always visible, and above all, obvious. Turgot wittily expresses this when he says the indirect tax is the best way "of plucking the turkey without making it cry out."

And Mill, chapter 6, section 1, expresses the same thought in a graver way :—

"Are direct or indirect taxes the most eligible? This question, at all times interesting, has of late excited a considerable amount of discussion. In England there is a popular feeling, of old standing, in favour of indirect, or it should rather be said in opposition to direct taxation. The feeling is not grounded on the merits of the case, and is of a puerile kind. An Englishman dislikes not so much the payment as the act of paying. He dislikes seeing the face of the tax collector, and being subjected to his peremptory demand. Perhaps, too, the money which he is required to pay directly out of his pocket is the only taxation which he is quite sure that he pays at all."

It is evident to me, that the statesmen who laid the foundations and fixed the terms of our constitution took fully into account this popular feeling expressed by Mill, and that they thought they could not find a more efficacious means of controlling the provincial power than confining it to direct taxation, convinced that the attention of the people being thus drawn to the acts of their rulers they would only allow them to impose those taxes which they thought should be borne.

But on the other hand it seems reasonable also to conclude that if this is the restraint which it has been thought should be imposed on the power of the provincial legislatures, we should at least allow to this power the full range which it legitimately has, and which the least disputed principles of political economy allow.

Everything agrees then in shewing that the tax demanded from [43] the defendant company is a direct tax, and that the provincial legislature in the lawful exercise of its powers could lawfully impose it.

2. Does this tax constitute a regulation of commerce? Section 91 of the Imperial statute of 1867 confers exclusively on the federal Parliament the power of making laws for the regulation of trade and commerce.

What is the scope of this provision?

If we wished to seek for the meaning of it in the American jurisprudence it would still be necessary for us to shew first that the respective provisions of their two constitutions on this matter are not identical. In fact while the clause in our statute is unqualified, that of the American constitution is qualified. Thus sub-section 3 of section 8 of the first article of the constitution of the United States says that Congress shall have the power of regulating commerce: 1. With foreign nations; 2. Between the different States; and 3, with the Indian tribes. The authority of Congress is then formally determined; thus the American lawyers admit that the States have complete control of their internal commerce; it being understood that this control is not exercised in such a way as to conflict with the federal laws relating to general commerce. (Burroughs on Taxation, p. 104.)

There is then even here a sufficient difference between the two constitutions to prevent us from accepting without reserve the opinions of American lawyers and economists and the jurisprudence of their Courts, and to make us seek elsewhere the particular meaning of this provision of our own constitution.

Moreover, our task on this point is much facilitated by a judgment of the highest Court of the Empire, the Privy Council; a decision which though it does not give us an absolute and definitive rule for the interpretation of this clause of our constitutional statute, still points out to us sufficiently the way to allow us to avail ourselves of its authority.

[14] In the case of *Citizens' Insurance Company v. Parsons* (1) the Lords of the Privy Council expressed themselves as follows:

“The words ‘regulation of trade and commerce,’ in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign governments, requiring the sanction of Parliament, down to minute

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(1) 7 App. Cas. 96, 112; ante, vol. 1, pp. 265, 277.

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rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the Legislature when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in sect. 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

“ ‘Regulation of trade and commerce’ may have been used in some such sense as the words ‘regulations of trade’ in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in other Acts of State. Article V of the Act of Union enacted that all the subjects of the United Kingdom should have ‘full freedom and intercourse of trade and navigation’ to and from all places in the United Kingdom and the Colonies; and article VI enacted that all parts of the United Kingdom, from and after the Union, should be under the *same* ‘prohibitions, restrictions, and regulations of trade.’ Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the articles of Union. Thus the Acts for [45] regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

“ Construing, therefore, the words ‘regulation of trade and commerce’ by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance, in a single Province, and therefore, that its legislative authority does not in the present case conflict or

compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 13 of section 92."

To sum up these observations. Although the absolute meaning of the words "regulation of trade and commerce" seems to confer on the federal Parliament absolute and exclusive authority over everything which in any way can come within such a subject, the Privy Council does not hesitate to say that it would not be possible to give so extended a scope to this article of our constitution. And tracing the limit which appeared to it to have been in the intention of the legislator, the supreme tribunal declares that the jurisdiction of the federal power extends without doubt to that regulation of commerce which is the consequence of political arrangements, to that relative to inter-provincial commerce and perhaps to the regulation of commerce in general. but that it could not go further. In other words, that all legislation regulating commerce in, shall I say, a national point of view, is unquestionably within the jurisdiction of the federal legislature, but that it would be going beyond [46] this purpose to shut up the provincial legislatures within a band of iron and to prohibit them from all legislation which might affect even accidentally commerce or commercial persons.

Where would a different interpretation lead if not to the certain indeed inevitable absorption of all the legislative powers by the central authority. For commerce is the living and fruitful element which is at the very base of modern societies and which penetrates, surrounds and rules all the relations of individual persons. And as Mr. Justice Fournier very well expresses it in this same case of *Citizens' Insurance Company v. Parsons* (1): "In commerce, contracts of sale, of exchange and hiring, are constantly employed and executed. Does it then follow that any legislation in reference thereto, must be considered as being a regulation of commerce? If this be so—if everything which has reference to commerce ought for this reason to come under the exclusive control of the federal power, the greater portion of the powers of the Provinces would thus become of no avail, for commerce in its most comprehensive meaning extends to everything. It is as defined by a French author: 'Un échange de produits et de services. C'est en dernière analyse, le fonds même de la société.'"

And it is this reasoning of the learned Judge which has been adopted and sanctioned by the Privy Council in the case which I have just cited.

Is it not evident moreover, that if we desire the maintenance of the

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(1) 4 Can. S. C. R. p. 270; ante, vol. 1, p. 301.

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constitution, (and the Courts cannot suppose the contrary) it is indispensable to harmonise the functions of these two authorities—federal and provincial—the ill-defined boundaries of which remain undecided and uncertain on so many points? Is it not necessary to grant to the provincial legislatures the recognition in the sphere which is given to them of their full liberty of action, with the elasticity necessary to the working of all political institutions? Now, sub-sect. 2 of sect. 92 of the Statute of 1867 allows the provincial legislatures to [47] have recourse to direct taxation for the purpose of raising a revenue for provincial purposes. There is a grant of a power formal and precise. What will become of it if it is necessary to give up the application of it to commerce or to merchants? But a capitation tax even the most direct of all taxes could not then reach this privileged caste which could only be amenable to the federal authority. And we should arrive at this singular anomaly that, while by the admission of all, the municipal authority—creature of the provincial authority—could tax commerce by taxing merchants in the exercise of their profession, the creative authority would be prevented from exercising for itself this power which it can confer on a simple municipality.

It seems to me impossible to reason thus and to find the justification of this reasoning in the provisions soundly interpreted of the Imperial Statute of 1867.

To regulate commerce in the sense indicated by the constitution, and determined by the highest court in our judicial hierarchy may be described thus: To fix, by general laws, the conditions of the importation or exportation of merchandise, the working of fisheries, of navigation, the commercial relations of the provinces between themselves, etc. But it would certainly be impossible to give such a scope, to attribute such a character to the imposition of a tax imposed with a purely provincial object, from the fact alone that that tax would reach merchants. That is not, we repeat, the meaning which the Privy Council attaches to that section of the statute, and neither can it be that which the framers of the constitution had in view.

The legislature of Quebec, in using the power formally granted to it, and in enacting, for the needs of its treasury, a direct tax on certain institutions carrying on business in the province, has not then gone beyond its powers, has not legislated on a matter which was not within its competence, and has not regulated commerce.

But it is here objected that if the provincial legislatures are [48] allowed to tax merchants it will result, indirectly, in seriously

affecting commerce, in even fettering it in certain cases, and the American jurisprudence is referred to, which has declared unconstitutional a tax imposed by the States on importers.

In the United States the courts alone have the control of the legislative powers, they alone have received from the constitution itself the jurisdiction necessary to keep each authority within its constitutional limits.

Our political organization is quite different. Here the federal authority itself is armed with an almost absolute power of veto to repress the encroachments which the provincial legislatures might attempt to its detriment; and it is only implicitly, and by, so to say, a necessary consequence of our political system that the courts can be called on to decide in such matters.

Now, is it not evident that when it is a question, as in the present instance, of the imposition of a tax which a formal provision of the constitution authorizes and justifies; of a tax against which the only plausible objection could come from the government interested, namely, the federal government, if it had considered that that tax was hostile to its legislation; is it not evident that the judicial power could not substitute itself for the federal power, usurp its jurisdiction, take on itself its functions and impose its veto on that legislation which the authority interested has tacitly approved, inasmuch as having the power to repudiate it, it has not done so.

It is maintained, it is true, that it would be very impolitic thus to require the exercise of this right of veto by the federal authority in all circumstances, and that there would soon result from it a clashing which would place in danger the very existence of confederation. But would it be less impolitic and less dangerous to send back, virtually, the exercise of this power to the courts, which have not themselves the advantages of the diplomatic temper, and which have not any other alternative than to give a rigorously legal interpretation? The danger would be evidently greater in the second [49] case than in the first, and we do not hesitate to believe that it is because the authors of the statute of 1867 foresaw this that they believed it preferable to grant this right of veto to the central government.

A last objection of the defence remains to be examined, which is that the defendant company not having been created by the provincial legislature, and having been duly licensed by the federal government for the exercise of its rights, it escapes from the control of the provincial authority.

This objection has not been insisted on in the pleadings, and I

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confess that it scarcely appears to me serious. It would indeed be very singular that the federal power could either, by creating it itself or by giving it a license, withdraw a private corporation from the control of the local authority in any province whatever.

In the United States where we have so often been to seek examples, it has been maintained that the states could not tax a public corporation created by the federal power for a national purpose, but the matter has not been carried further, and that is indeed, we may believe, the only reasonable limit.

I conclude then, on the whole :—

1. That the tax demanded is a direct tax ;
2. That this tax has been imposed by the provincial legislature in the legitimate exercise of a power formally granted by the constitution ;
3. Lastly, that this tax does not constitute a regulation of commerce within the meaning of sect. 91 of the statute of 1867.

The exceptions of the defendant company are, therefore, dismissed, and judgment is given for the plaintiff *ès-qualité* for the sum demanded.

The same judgment is given in the thirty-nine other cases.

The judgment is as follows :—

The court, etc.

Whereas by the Act of the Provincial Legislature of Quebec, 45 Vict., c. 22, intituled " An Act to impose certain direct taxes on [50] certain commercial corporations," it has been enacted that every assurance company accepting risks and doing assurance business in this province, should pay yearly for a single place of business \$400, for each additional place of business a sum of \$50, and for each office at Montreal or at Quebec a sum of \$100 ; and that these different sums should be payable the first judicial day of July in each year, to the inspector of licenses of the revenue district where the company should have its office ;

Whereas the defendant is an insurance company having an office in the city of Montreal, and there transacting a life and fire business, so that it is liable for certain sums above mentioned, amounting to \$550, which the plaintiff *ès-qualité* demands from it as being due and payable since the third of July, 1882 ;

Whereas the defendant pleads to this claim by two exception saying :—

1. That the law invoked has no legal existence inasmuch as it has been irregularly passed in the name of Her Majesty, who forms

no part of the provincial legislature and has no legislative power in this province.

2. That if this law has any existence whatever it is in all respects unconstitutional and cannot affect the defendant.

(a) Because this company has not been created by the provincial legislature and is duly licensed by the federal power to exercise its rights ;

(e) Because the tax demanded is not a direct tax ;

(i) Because this tax is only imposed on certain classes of the population ; because it only touches commercial corporations and not property, and does not fall within any of the classes of taxes which the legislature has the right to impose ;

(o) Because this tax constitutes a regulation of commerce ;

(u) Lastly because this tax is of the nature of a license.

Considering that Her Majesty, personification of the sovereign authority in all the provinces of the empire, forms essentially a part of the different legislatures created for the special government of these provinces, and the lieutenant-governors in them are only her representatives ;

Considering that, consequently the law relied on has been validly passed in the name of Her Majesty ;

Considering that every person or private corporation, enjoying any rights whatever within the limits of the province is there necessarily subject to the control of the legislature of that province, and to the obligations which it is able to impose for the contribution of each to the public charges, and that no license of the federal power could restrict the defendant to these obligations ;

Considering that the tax demanded strikes the corporations on which it is imposed directly and without any intermediary between them and the treasury, which is the essential and main characteristic of direct taxation ;

Considering that the division of taxation between different classes of citizens cannot be called in question before the Courts, the legislature being sole judge of the propriety of the division adopted by it ;

Considering that nothing in the constitutional Act of 1867 takes from the provincial legislatures the power of taxing commercial corporations or others and the tax imposed, which is of the nature of a business tax demanded by reason of the exercise of a profession or business, is essentially within the powers of the provincial legislative authority ;

Considering that the tax demanded does not constitute a regula-

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tion of commerce within the meaning of sect. 91 of the Imperial Statute of 1867 ;

Considering that the exceptions and defences of the defendant are therefore ill founded ;

The Court dismisses them and orders the said defendant to pay to the plaintiff *à qualité* the said sum of \$550 with interest from the third of July, 1882, and the taxed costs, etc.

PRIVY COUNCIL.

ST. CATHERINE'S MILLING AND LUMBER COMPANY,

Defendants ;

AND

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-
GENERAL FOR ONTARIO *Plaintiff.**On appeal from the Supreme Court of Canada.**(Reported 14 App. Cas. 46.)**British North America Act, 1867, s. 109—Lands Reserved to the
Indians—Rights of the Province.*J. O.*
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Sect. 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sec's 108 and 117.

Attorney-General of Ontario v. Mercer (8 App. Cas. 767 ; ante, vol. 3, p. 1), followed.

By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands, "parts of our dominions and territories," as, not having been ceded to or purchased by the Crown, were reserved, "for the present," to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the governor of the colony in which the lands lie, and not by any private person.

In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing :—

Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the good-will

* *Present* :—THE EARL OF SELBORNE, LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR RICHARD COUCH.

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of the Crown ; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was " an interest other than that of the Province in the same " within the meaning of sect. 109.

Held also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.

Appeal from a judgment of the Supreme Court, dated June 20, 1887 (1) (Ritchie, C.J., Fournier, Henry and [47] Taschereau, JJ., Strong and Gwynne, JJ., dissenting), which affirmed a judgment of the Chancery Division of the High Court of Justice for Ontario (June 10, 1885), (2).

The question in the appeal was whether certain lands admittedly situated within the boundaries of Ontario belonged to that Province or to the Dominion of Canada. The appellants cut timber on the lands, which are Crown lands, without authority from the Ontario Government, which accordingly sued for an injunction and damages. The appellants justified by setting up a license from the Dominion Government, dated 1st of May, 1883. The Courts in Canada decided in favour of the Province. The order of Her Majesty in Council granting special leave to appeal, provided that the Dominion should be at liberty to intervene in the appeal.

The circumstances out of which the dispute as to title arose are set out in the judgment of their Lordships.

Sir *R. E. Webster*, A.G., and *Gore*, for the Attorney-General for the Dominion.

McCarthy, Q.C. (Canada), and *Jeune*, Q.C., for the appellants.

(1) 13 Can. S. C. R. 577 ; *post* p. 127. (2) 10 Ont. Rep. 196 ; *post*, p. 214.

Mowat, Q.C. (*Attorney-General for Ontario*), and *Blake*, Q.C. (Sir *Horace Davey*, Q.C., and *Haldane*, with them), for the respondents.

Sir *R. E. Webster*, A.G., and *McCarthy*, Q.C., contended that the judgment of the Supreme Court should be reversed. It lay on the respondent to make good the title of the Province to these lands. Previous to the treaty of the 3rd of October, 1873, the lands in suit, and the whole area of which they formed part, were occupied by a tribe of Ojibbeway Indians, who by that treaty ceded the whole area in manner as therein mentioned to the Government of the Dominion. The Provincial Government were no party to this treaty, and it was admitted that no surrender had been made of Indian title except to the Dominion. Reference was made to the British North America Act, 1867, sect. 91, sub-sect. 24, which gives to the Dominion exclusive legislative authority over "Indians and lands reserved for the Indians" as compared with sect. 92, sub-sect. 5, which [48] assigns "the management and sale of public lands belonging to the Province, and of the timber and wood thereon" to the legislative authority of the Province. Also to sects. 109 and 117, and to *Attorney-General of Ontario v. Mercer* (1).

Documentary evidence was referred to, to shew the nature and character of the Indian title. It was contended that the effect of it was to shew that from the earliest times the Indians had and were always recognised as having, a complete proprietary interest, limited by an imperfect power of alienation. British and Canadian legislation was referred to, to shew that such complete title had been uniformly recognised: see Royal Pro-

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(1) 8 App. Cas. 767; *ante*, vol. 3, p. 1.

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clamation, October 7, 1763, held by Lord Mansfield in *Campbell v. Hall* (1) to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right; 48 Geo. 3, c. 138; 1 & 2 Geo. 4, c. 66; 17 Geo. 3, c. 7 (Quebec); 10 Geo. 4, c. 3 (Upper Canada); 7 Will. 4, c. 118; 2 Vict. c. 15, and 12 Vict. c. 9 (Upper Canada); 13 & 14 Vict. c. 74 (Upper Canada); 14 & 15 Vict. c. 51 (Upper Canada); 16 Vict. c. 91 (Upper Canada); 20 Vict. c. 26 (Upper Canada). The proclamation in 1763 was uniformly acted on and recognised by the Government as well as the legislature, and was regarded by the Indians as their charter. It was not superseded by the Quebec Act (14 Geo. 3, c. 83, Imperial Statute); but it was held by the Supreme Court of the United States to be still in force in 1828: see *Johnson v. McIntosh* (2). Reference was also made to *The Cherokee Nation v. The State of Georgia* (3) and *Worcester v. The State of Georgia* (4); *United States v. Clarke* (5); *Mitchel v. United States* (6); *The State of Georgia v. Canatoo*, reported in a note to Kent's Commentaries, vol. iii., p. 378; *Ogden v. Lee* (7); *Fellows v. Lee* (8); *Gaines v. Nicholson* (9); Chitty's Prerog. of the Crown, p. 29. Reference was also made to the case of *The Queen v. Symonds* (June, 1847), in Parliamentary Papers, 1860, vol. xlvii., p. 47 (Colonies New Zealand), where also there was said to be a report of a Select Committee of the House of Commons on the Treatment [49] of the Aborigines in British settlements. Also to a report in Appendix I. to Journals, House of Assembly,

(1) 1 Cowp. 204.

(2) 8 Wheaton, 543.

(3) 5 Peters, 1.

(4) 6 Peters, 515.

(5) 9 Peters, 168.

(6) 9 Peters, 711.

(7) 6 Hilla, 546.

(8) 5 Denio, 628.

(9) 9 Howard, 356.

Canada, 1847, headed "Title to Lands and Tenure of Land."

The absolute title being in the Indians was ceded by them, subject to certain reservations, for valuable consideration to the Dominion, and the treaty to that effect did not enure to the benefit of the Province in any way. The Province could not claim property in the land except by virtue of the Act of 1867, and as regards that Act the lands did not belong to the Province prior thereto within sect. 109; they were not in 1867 public property which the Province could retain under sect. 117; they were not public lands of the Province within sect. 92, sub-sect. 5.

Mowat, Q.C., and *Blake*, Q.C., for the respondent, contended that both before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians. The lands being within the limits of the Province, the beneficial interest therein passed to the Province under the Act of 1867, and the Dominion obtained thereunder no such interest as it claims in this suit. Even if they were lands reserved for the Indians within the meaning of the Act, the Dominion gained thereunder only a power of legislating in respect to them, it did not gain ownership or a right to become owner by purchase from the Indians. Under sect. 109, whether reserved to the Indians or not, the land goes to the Province subject to any interest on the part of the Indians. See also sect. 108 and sect. 91, sub-sect. 9. With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before the conquest or against the Crown of England since the conquest. Their title was in the nature of a personal right of occupation during the pleasure of

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the Crown, and it was not a legal or an equitable title in the ordinary sense. For instance, the Crown made grants of land in every part of British North America both before and after the proclamation of 1763 without any previous extinguishment of the Indian claim. The grantees in those cases had to deal with the Indian claims, but the legal validity of the grants themselves was undeniably recognised both in the Canadian and the [50] American Courts. As regards that proclamation it was argued that it was not intended to divest, and did not divest, the Crown of its absolute title to the lands, and the reservation, upon which so much argument has been rested, was expressed to last only "for the present and until our further pleasure be known." Further, as regards the lands now in suit, the proclamation was superseded by the Imperial Act of 1774, known as the Quebec Act, which added that land to the Province. It was not the intention of that Act to give to the Indians any new right over and above the interest which they possessed under the proclamation, and which was a mere license terminable at the will of the Crown. With regard to the effect of purchases from the Indians, reference was made to *Meigs v. McClung's Lessee* (1), and *Clark v. Smith* (2).

With regard to the application of the British North America Act and the construction to be placed upon it, it was submitted that that Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words. The general scheme, purpose, and intent of the Act should be borne in mind. The scheme is to create a federal union consisting of sev-

(1) 9 Cranch, 11. (2) 13 Peters, 195.

eral entities. The purpose was at the same time to preserve the Provinces, not as fractions of a unit, but as units of a multiple. The Provinces are to be on an equal footing. The ownership and development of Crown lands and the revenues therefrom are to be left to the Province in which they are situated. As to legislative powers, it is the residuum which is left to the Dominion; as to proprietary rights, the residuum goes to the Provinces. Where property is intended to go to the Dominion it is specifically granted, even though legislative authority over it may already have been vested in the Dominion. It is contrary to the spirit of the Act to hold that the grant of legislative power over lands reserved for the Indians carries with it by implication a grant of proprietary right.

Sir *R. E. Webster*, A.G., replied :—

Upon the question whether the old Province of Canada had any right to the lands in suit at the date of the [51] Act of 1867 which passed thereunder, certain legislative duties had been conferred on the Province with regard to Indians, and a certain power of bargaining with regard to Indian lands; but no proprietary right had been given: see 2 Vict. c. 15 (U.C.), which was held to apply to unsurrendered lands in *The Queen v. Strong* (1), and *Little v. Keating* (2). There is a series of statutes which shews that prior to 1867 the Province had nothing but some slight legislative rights over the land: see 3 & 4 Vict. c. 35, s. 54; 12 Vict. c. 9; 13 & 14 Vict. c. 74; Cons. Stat. 22 Vict. (U.C.) c. 81; 23 Vict. c. 61, s. 54. The whole course of legislation before 1867 was that the proceeds of the Indian lands should be kept for the Indians, and not go to the Province. [LORD

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(1) 1 Grant, 392.

(2) 6 U.C.Q.B. (O.S.), 265.

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SELBORNE:—This is the first suggestion to that effect.] Reference was then made to the later Dominion Acts, 31 Vict. c. 42, ss. 6, 7, 8, 10, 11, especially 25; 39 Vict. c. 18; 43 Vict. c. 28. The Crown lands were dealt with by 23 Vict. c. 2; the Indian lands by 23 Vict. c. 151. Reference was made to *Vanvleck v. Stewart* (1); *Fegan v. McLean* (2), as shewing that the Indians had the right to cut and sell timber in the special reserves and appropriate the proceeds.

The judgment of their Lordships was delivered by LORD WATSON :—

On the 3rd of October, 1873, a formal treaty, or contract, was concluded between commissioners appointed by the Government of the Dominion of Canada on behalf of Her Majesty the Queen, of the one part, and a number of chiefs and headmen duly chosen to represent the Salteaux tribe of Ojibbeway Indians, of the other part, by which the latter, for certain considerations, released and surrendered to the Government of the Dominion, for Her Majesty and her successors, the whole right and title of the Indian inhabitants whom they represented, to a tract of country upwards of fifty thousand square miles in extent. By an article of the treaty, it is stipulated that, subject to such regulations as may be made by the Dominion Government, the Indians are to have right to pursue their avocations of hunting and [52] fishing throughout the surrendered territory, with the exception of those portions of it which may, from time to time, be required or taken up for settlement, mining, lumbering, or other purposes.

1) 19 U.C.Q.B. 489.

(4) 29 U.C.Q.B. 202.

Of the territory thus ceded to the Crown, an area of not less than 32,000 square miles is situated within the boundaries of the Province of Ontario ; and, with respect to that area, a controversy has arisen between the Dominion and Ontario, each of them maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty.

Acting on the assumption that the beneficial interest in these lands had passed to the Dominion Government, their Crown Timber Agent, on the 1st of May, 1883, issued to the appellants, the St. Catherine's Milling and Lumber Company, a permit to cut and carry away one million feet of lumber from a specified portion of the disputed area. The appellants having availed themselves of that license, a writ was filed against them in the Chancery Division of the High Court of Ontario, at the instance of the Queen on the information of the Attorney-General of the Province, praying—(1) a declaration that the appellants have no rights in respect of the timber cut by them upon the lands specified in their permit ; (2) an injunction restraining them from trespassing on the premises and from cutting any timber thereon ; (3) an injunction against the removal of timber already cut ; and (4) decree for the damage occasioned by their wrongful acts. The Chancellor of Ontario, on the 10th of June, 1885, decerned with costs against the appellants, in terms of the first three of these conclusions, and referred the amount of damage to the Master in Ordinary. The judgment of the learned Chancellor was unanimously affirmed on the 20th of April, 1886, by the Court of Appeal for Ontario, and an appeal taken from their

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decision to the Supreme Court of Canada was dismissed on the 20th of June, 1887, by a majority of four of the six judges constituting the court.

Although the present case relates exclusively to the right of the Government of Canada to dispose of the [53] timber in question to the appellant company, yet its decision necessarily involves the determination of the larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873. In these circumstances, Her Majesty, by the same order which gave the appellants leave to bring the judgment of the Court below under the review of this Board, was pleased to direct that the Government of the Dominion of Canada should be at liberty to intervene in this appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses, and their Lordships have had the advantage of hearing from their counsel an able and exhaustive argument in support of their claim to that part of the ceded territory which lies within the provincial boundaries of Ontario.

The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any previous time been held or acquired by the Crown of France. A royal proclamation was issued on the 7th of October, 1763, shortly after the date of the treaty of Paris, by which His Majesty King George erected four distinct and separate Governments, styled respectively, Quebec, East Florida, West Florida, and Grenada, specific boundaries being assigned to each

of them. Upon the narrative that it was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the "possession of such parts of Our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds," it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or "until Our further pleasure be known," upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them. It was further declared "to be Our Royal will, for the present, as aforesaid, [54] to reserve under Our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of Our said three new Governments, or within the limits of the territory granted to the Hudson's Bay Company." The proclamation also enacts that no private person shall make any purchase from the Indians of lands reserved to them within those colonies where settlement was permitted, and that all purchases must be on behalf of the Crown, in a public assembly of the Indians, by the governor or commander-in-chief of the colony in which the lands lie.

The territory in dispute has been in Indian occupation from the date of the proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North

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America Act, 1867) by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or headmen convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested, in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never been "ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories," and it is declared to be the will and pleasure [55] of the Sovereign that, "for the present," they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express

any opinion upon the point. It appears to them to be sufficient for the purposes of this case, that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

By an Imperial statute passed in the year 1840 (3 & 4 Vict., c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the Province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces should be paid into the consolidated fund of the new Province. There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the British North America Act, 1867. Had the Indian inhabitants of the area in question released their interest in it to the Crown at any time between 1840 and the date of that Act, it does not seem to admit of doubt, and it was not disputed by the learned counsel for the Dominion, that all revenues derived from its being taken up for settlement, mining, lumbering, and other purposes would have been the property of the Province of Canada.

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The case maintained for the appellants is that the Act of 1867 transferred to the Dominion all interest in Indian lands which previously belonged to the Province.

The Act of 1867, which created the Federal Govern-
[56] ment, repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate Provinces, under the titles of Ontario and Quebec, due provision being made (sect. 142) for the division between them of the property and assets of the united province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective Provinces included in the Union, on the one hand, and the Dominion, on the other. The conflicting claims to the ceded territory maintained by the Dominion and the Province of Ontario are wholly dependent upon these statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its Legislature, the land itself being vested in the Crown.

Sect. 108 enacts that the public works and undertakings enumerated in Schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the Provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for

the purpose of national defence, and of "lands set apart for general public purposes." It is obvious that the enumeration cannot be reasonably held to include Crown lands which are reserved for Indian use. The only other clause in the Act by which a share of what previously constituted provincial revenues and assets is directly assigned to the Dominion is sect. 102. It enacts that all "duties and revenues" over which the respective legislatures of the United Provinces had and have power of appropriation, "except such portions thereof as are by this Act reserved to the respective legislatures of the Provinces, or are raised by them in accordance with the special powers conferred upon them by this Act" shall form one consolidated fund, to be appropriated for the [57] public service of Canada. The extent to which duties and revenues arising within the limits of Ontario, and over which the legislature of the old Province of Canada possessed the power of appropriation before the passing of the Act, have been transferred to the Dominion by this clause, can only be ascertained by reference to the two exceptions which it makes in favour of the new provincial legislatures.

The second of these exceptions has really no bearing on the present case, because it comprises nothing beyond the revenues which provincial legislatures are empowered to raise by means of direct taxation for provincial purposes, in terms of sect. 92 (2). The first of them, which appears to comprehend the whole sources of revenue reserved to the Provinces by sect. 109, is of material consequence. Sect. 109 provides that "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or pay-

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able for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situated or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same." In connection with this clause it may be observed that by sect. 117 it is declared that the Provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject matter of the first exception, and the property which is directly appropriated to the Provinces; but it hardly admits of doubt that the interests in land, mines, minerals and royalties, which by sect. 109 are declared to belong to the Provinces, include, if they are not identical with, the "duties and revenues" first excepted in sect. 102.

The enactments of sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such [58] lands as the Dominion acquired right to under sect. 108, or might assume for the purposes specified in sect. 117. Its legal effect is to exclude from the "duties and revenues" appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the Provinces. That construction of the statute was accepted by this Board in deciding *Attorney-General of Ontario v. Mercer*, (1) where the controversy related to

(1) 8 App. Cas. 767; *ante*, vol. 3, p. 1.

land granted in fee simple to a subject before 1867, which became escheat to the Crown in the year 1871. The Lord Chancellor (Earl Selborne) in delivering judgment in that case, said (1): "It was not disputed, in the argument for the Dominion at the bar, that all territorial revenues arising within each Province from 'lands' (in which term must be comprehended all estates in land), which at the time of the union belonged to the Crown, were reserved to the respective Provinces by sect. 109; and it was admitted that no distinction could, in that respect, be made between lands then ungranted and lands which had previously reverted to the Crown by escheat. But it was insisted that a line was drawn at the date of the union, and that the words were not sufficient to reserve any lands afterwards escheated which at the time of the union were in private hands, and did not then belong to the Crown." Their Lordships indicated an opinion to the effect that the escheat would not, in the special circumstances of that case, have passed to the Province as "lands"; but they held that it fell within the class of rights reserved to the Provinces as "royalties" by sect. 109.

Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario v. Mercer* (2) might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the

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(1) 8 App. Cas. 776; *ante*, vol. 3,
 p. 12.

(2) 8 App. Cas. 767; *ante*, vol. 3,
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Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must [59] now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.

In the course of the argument the claim of the Dominion to the ceded territory was rested upon the provisions of sect. 91 (24), which in express terms confer upon the Parliament of Canada power to make laws for "Indians, and lands reserved for the Indians." It was urged that the exclusive power of legislation and administration carried with it, by necessary implication, any patrimonial interest which the Crown might have had in the reserved lands. In reply to that reasoning, counsel for Ontario referred us to a series of provincial statutes prior in date to the Act of 1867, for the purpose of shewing that the expression "Indian reserves" was used in legislative language to designate certain lands in which the Indians had, after the royal proclamation of 1763, acquired a special interest, by treaty or otherwise, and did not apply to land occupied by them in virtue of the proclamation. The argument might have deserved consideration if the expression had been adopted by the British Parliament in 1867, but it does not occur in sect. 91 (24), and the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation. It appears to be the plain policy of the Act that, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.

Their Lordships are, however, unable to assent to the argument for the Dominion founded on sect. 91 (24). There can be no *à priori* probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

[60] By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, in order that it might be opened up for settlement, immigration, and such other purposes as to Her Majesty might seem fit, "to the Government of the Dominion of Canada," for the Queen and Her successors for ever. It was argued that a cession in these terms was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown. That is not the natural import of the language of the treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favourable to the argument of the Dominion upon this point, it is abundantly clear that the commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority nor power to take away from Ontario

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the interest which had been assigned to that Province by the Imperial Statute of 1867.

These considerations appear to their Lordships to be sufficient for the disposal of this appeal. The treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province. The fact, that it still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits or otherwise, of that beneficial interest in the timber which has now passed to Ontario. Seeing that the benefit of the surrender accrues to her, Ontario must, of course, relieve the Crown, and the Dominion, of all obligations, involving the payment of money, which were undertaken by Her Majesty, and which are said to have been in part fulfilled by the Dominion Government. There may be other questions behind, with respect to the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing, is to be taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit.

Their Lordships will therefore humbly advise Her [61] Majesty that the judgment of the Supreme Court of Canada ought to be affirmed, and the appeal dismissed. It appears to them that there ought to be no costs of the appeal.

JUDGMENTS IN SUPREME COURT OF CANADA.

(Reported 13 Can. S. C. R., 577.)

RITCHIE, C. J.:—

[599] I am of opinion that all ungranted lands in the Province of Ontario belong to the Crown as part of the public domain, subject to the Indian right of occupancy, in cases in which the same has not been lawfully extinguished, and when such right of occupancy has been lawfully extinguished absolutely to the Crown, and as a consequence to the Province of Ontario. I think the Crown owns the soil of all the unpatented lands, the Indians possessing only the right of occupancy, and the Crown possessing the legal title subject to that occupancy, with the absolute exclusive [600] right to extinguish the Indian title either by conquest or by purchase ; that, as was said by Mr. Justice Story (1) :—

“ It was deemed a right exclusively belonging to the Government in its sovereign capacity to extinguish the Indian title and to perfect its own dominion over the soil and dispose of it according to its own good pleasure. . . . The European discoverers claimed and exercised the right to grant the soil while yet in possession of the natives, subject, however, to their right of occupancy.”

That the title to lands where the Indian title has not been extinguished is in the Crown, would seem to be clearly indicated by Dominion legislation since confederation. See 31 Vict. c. 42 ; 33 Vict. c. 3 ; 43 Vict. c. 36.

I agree that the whole course of legislation in all the Provinces before, and in the Dominion since, confederation attaches a well understood and distinct meaning to the words “ Indian reserves or lands reserved for the Indians,” and which cover only lands specifically appropriated or reserved in the Indian territories, or out of the public lands, and I entirely agree with the learned Chancellor that the words “ lands reserved for the Indians,” were used in the B. N. A. Act in the same sense with reference to lands specifically set apart and reserved for the exclusive use of the Indians. In no sense that I can understand can it be said that lands in which the Indian title has been wholly extinguished are lands reserved for the Indians.

The boundary of the territory in the north-west angle being established, and the lands in question found to be within the

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1) Story on the Constitution 4th Ed. ss. 6, 7.

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Province of Ontario, they are necessarily, territorially, a part of Ontario, and the ungranted portion of such lands not specifically reserved for the Indians, though unsurrendered and therefore subject to the Indian title, forms part of the public domain of Ontario, and they are consequently public lands belonging to [601] Ontario, and as such pass, under the B. N. A. Act, to Ontario, under and by virtue of sub-sect. 5 of sect. 92 and sect. 109 as to lands, mines, minerals and royalties, and sect. 117, by which the Provinces are to retain all their property not otherwise disposed of by that Act subject to the right of the Dominion to assume any lands or public property for fortifications, etc., and therefore, under the B. N. A. Act, the Province of Ontario has a clear title to all unpatented lands within its boundaries as part of the provincial public property, subject only to the Indian right of occupancy, and absolute when the Indian right of occupancy is extinguished.

I am therefore of opinion that, when the Dominion government, in 1873, extinguished the Indian claim or title, its effect was, so far as the question now before us is concerned, simply to relieve the legal ownership of the land belonging to the Province from the burden, incumbrance, or however it may be designated, of the Indian title. It therefore follows that the claim of the Dominion to authorize the cutting of timber on these lands cannot be supported, and the Province has a right to interfere and prevent their spoliation.

This case has been so fully and ably dealt with by the learned Chancellor, and I so entirely agree with the conclusions at which he has arrived, that I feel I can add nothing to what has been said by him. Many questions have been suggested during the argument of this case, and in some of the judgments of the court below, but I have, purposely, carefully avoided discussing or expressing any opinion on questions not immediately necessary for the decision of this case, leaving all such matters to be disposed of when they legitimately arise and become necessary for the determination of a pending controversy.

STRONG, J.:—

[602] By the report of the Judicial Committee of the Privy Council of the 22nd July, 1884, made upon a reference to it of the question of disputed boundaries between the Provinces of Ontario and Manitoba, and which report was adopted by Her Majesty and

embodied in the Order in Council of the 11th of August, 1884, (1) the territory in which the lands now in question are included was determined to be comprised within the limits of the Province of Ontario. This decision of the Judicial Committee, whilst defining the political boundaries according to the contention of the last named Province, does not, however, in any way bear upon the question here in controversy between the Dominion of Canada and the Province of Ontario regarding the proprietorship of the lands now in dispute. The decision of the present appeal depends altogether upon the construction to be placed upon certain provisions of the B. N. A. Act. By the 24th enumeration of sect. 91 of that Act, the power of legislation in respect of "Indians and lands reserved for the Indians," is conferred exclusively upon the parliament of Canada. By sect. 109 of the same Act,

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(1) The Order in Council of the 11th of August, 1884, is as follows:—

"Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 22nd of July last past in the words following, viz.:

"Your Majesty having been pleased by Your Order in Council of the 26th June, 1884, to refer unto this Committee the humble Petition of Oliver Mowat, Your Majesty's Attorney-General for the Province of Ontario as representing that Province, and of James Andrews Miller, Your Majesty's Attorney-General for the Province of Manitoba, as representing that Province in the matter of the boundary between the Provinces of Ontario and Manitoba, in the Dominion of Canada, between the Province of Ontario of the one part and the Province of Manitoba of the other part, setting forth that a question has arisen and is in dispute between the Provinces of Ontario and Manitoba respecting the western boundary of the Province of Ontario and it has been agreed between those Provinces to submit such question

to Your Majesty in Council for determination: the following Special Case has accordingly been agreed upon between the Petitioners as representing the two Provinces aforesaid:—

"SPECIAL CASE.

"The Province of Ontario claims that the western boundary of that Province is either (1) the meridian of the most north-westerly angle of the Lake of the Woods, as described in a certain Award made on the 3rd August, 1878, by the Honourable Chief Justice Harrison, Sir Edward Thornton and Sir Francis Hincks, or (2) is a line west of that point.

"The Province of Manitoba claims that the boundary between that Province and the Province of Ontario is (1) the meridian of the confluence of the Ohio and Mississippi Rivers, or (2) is that portion of the height of land dividing the waters which flow into Hudson's Bay from those which empty into the valley of the Great Lakes, and lying to the west of the said meridian line.

"It has been agreed to refer the

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"All lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

By sect. 92, enumeration 5, exclusive power of legislation is given to the Provinces regarding "the management and sale of the public lands belonging to the Province, and of the timber and wood thereon."

The contention of the appellants is, that the lands now in

matter to the Judicial Committee of Her Majesty's Privy Council, and an Appendix has been prepared containing the materials agreed to be submitted with this Case for the adjudication of the dispute, each and every of the particulars in the said Appendix is submitted quantum valeat, and not otherwise.

"In addition to the particulars set forth in the Appendix, any historical or other matter may be adduced, which, in the opinion of either party, may be of importance to the contention of such party, and (subject to any rule or direction of the Judicial Committee in that behalf) such additional matter is to be printed as a separate Appendix by the party adducing the same, and copies are to be furnished at least 10 days before the argument.

"The book known as the Book of Arbitration Documents, may be referred to in the argument for the purpose of shewing in part what materials were before the Arbitrators.

"It is agreed that in the discussion before the Judicial Committee of the Privy Council reference may be made to any evidence of which Judicial notice may be

taken, or which (having regard to the nature of the case and the parties to it) the Privy Council may think material and proper to be considered, whether the same is or is not contained in the printed papers.

"The questions submitted to the Privy Council are the following:—

"(1) Whether the Award is or is not, under all the circumstances binding?

"(2) In case the Award is held not to settle the boundary in question, then what, on the evidence, is the true boundary between the said Provinces?

"(3) Whether in case legislation is needed to make the decision on this case binding or effectual, Acts passed by the Parliament of Canada and the Provincial Legislatures of Ontario and Manitoba in connection with the Imperial Act 34 & 35 Vict. cap. 28, or otherwise, will be sufficient, or whether a new Imperial Act for the purpose will be necessary.

"O. MOWAT,

"Attorney-General of Ontario.

"JAMES A. MILLER,

"Attorney-General of Manitoba."

question, and which are embraced in the territory formerly in dispute between the Provinces of Ontario and Manitoba, and which have been decided by the Judicial Committee to be within the [603] boundaries of Ontario, were, at the time of confederation, lands which had not been surrendered by the Indians, and consequently come within the definition of "lands reserved for the Indians" contained in sub-sect. 24 of sect. 91, and are therefore not public lands vested in the Province by the operation of sect. 109. The Province, on the other hand, insists that these are not "lands reserved for the Indians" within sub-sect. 24, and claims title to them under the provisions of sect. 109 as public lands which at the date of confederation "belonged" to the Province of Ontario.

It is obvious that these lands cannot be both public lands coming

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"And humbly praying that Your Majesty in Council will be pleased to take the said Special Case into consideration and that the said Special Case may be referred by Your Majesty to the Lords of the Judicial Committee of the Privy Council to report thereon to Your Majesty at the Board and that such Order may be made thereupon as to Your Majesty shall seem meet. The Lords of the Committee in obedience to Your Majesty's said Order of Reference have taken the said humble Petition and Special Case into consideration and having heard Counsel for the Province of Ontario and also for the Province of Manitoba their Lordships do this day agree humbly to report to Your Majesty as their opinion —

"1. That legislation by the Dominion of Canada as well as by the Province of Ontario was necessary to give binding effect as against the Dominion and the Province to the award of the 3rd August, 1878, and that as no such legislation has taken place the award is not binding.

"2. That nevertheless their Lordships find so much of the boundary lines laid down by that award as

relate to the territory now in dispute between the Province of Ontario and the Province of Manitoba to be substantially correct and in accordance with the conclusions which their Lordships have drawn from the evidence laid before them.

"That upon the evidence their Lordships find the true boundary between the western part of the Province of Ontario and the south-eastern part of the Province of Manitoba to be so much of a line drawn to the Lake of the Woods through the waters eastward of that lake and west of Long Lake which divide British North America from the territory of the United States and thence through the Lake of the Woods to the most north-western point of that lake as runs northward from the United States boundary and from the most north-western point of the Lake of the Woods a line drawn due north until it strikes the middle line of the course of the river discharging the waters of the lake called Lake Seul or the Lonely Lake whether above or below its confluence with the stream flowing from the Lake of the Woods towards Lake Winnipeg and their Lordships find the

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within the operation of sect. 109 and "lands reserved for the Indians," and so subject to the exclusive legislative power of the parliament of Canada, by force of sub-sect. 24 of sect. 91. The "public lands" mentioned in sect. 109 are manifestly those respecting which the Province has the right of exclusive legislation by sect. 92, sub-sect. 5. Then, these public lands referred to in sub-sect. 5, and which include all the lands "belonging" to the province, are clearly distinct from "lands reserved for the Indians," since lands so reserved are by sect. 91, sub-sect. 24 made exclusively subject to the legislative power of the Dominion. To hold that lands might be both public lands within sect. 109 and sub-sect. 5 of sect. 92, and "lands reserved for the Indians" within sub-sect. 24 of sect. 91, would be to determine that the same lands were subject to the exclusive powers of two separate and distinct legislatures, which would be absurd (1). This consideration alone is sufficient to

true boundary between the same two Provinces to the north of Ontario and to the south of Manitoba proceeding eastward from the point at which the before-mentioned line strikes the middle line of the course of the river last aforesaid to be along the middle line of the course of the same river (whether called by the name of the English River or as to the part below the confluence by the name of the River Winnipeg) up to Lake Seul or the Lonely Lake and thence along the middle line of Lake Seul or the Lonely Lake to the head of that lake and thence by a straight line to the nearest point of the middle line of the waters of Lake St. Joseph and thence along that middle line until it reaches the foot or outlet of that lake and thence along the middle line of the river by which the waters of Lake St. Joseph discharge themselves until it reaches a line drawn due north from the confluence of the Rivers Mississippi and Ohio which forms the boundary eastward of the Province of Manitoba.

"3. That without expressing an opinion as to the sufficiency or other-

wise of concurrent legislation of the Provinces of Ontario and Manitoba and of the Dominion of Canada (if such legislation should take place) their Lordships think it desirable and most expedient that an Imperial Act of Parliament should be passed to make this decision binding and effectual.

"Her Majesty having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution. Whereof the Governor-General of the Dominion of Canada, the Lieutenant-Governor of the Province of Ontario, the Lieutenant-Governor of the Province of Manitoba, and all other persons whom it may concern are to take notice and govern themselves accordingly."

[See now Imperial Act 52 and 53 Vict. cap. 28.]

(1) See as to conjoint effect of sect. 109 and sect. 92, sub-sect. 5, *Attorney-General v. Mercer*, 8 App. Cas. p. 776; *ante*, vol. 3, p. 12.

dispose of any argument derived from the latter clause of sect. 109, saving trusts existing in respect of public lands within its operation. [604] Moreover, the trusts thus preserved are manifestly of a different order from anything connected with lands reserved for Indians, for instance, those trusts subsisting in favour of persons who had contracted for the purchase of Crown Lands, but whose titles had not been perfected by grants. The word "trusts" would not be an appropriate expression to apply to the relation between the Crown and the Indians respecting the unceded lands of the latter. As will appear hereafter very clearly, such relationship is not in any sense that of trustee and cestui que trust, but rather one analogous to the feudal relationship of lord and tenant, or in some aspects to that one, so familiar in the Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary.

It will be convenient here to notice a point to which some importance has been attached in the Courts below. It is said that the B.N.A. Act contains no clause vesting in the Dominion the ultimate property in lands reserved for the Indians over which an exclusive power of legislation is by sect. 91 conferred on the Dominion Parliament, and that consequently, even though the lands now in question should be held to come within the 24th enumeration of the last mentioned section, yet as they are not vested in the Crown in right of the dominion nothing passed by the lease or license under which the appellants claim title. The answer to this objection is, first, that as this is an information on behalf of the Province, complaining of an intrusion upon provincial lands, the question to be decided in the first instance is that as to the title of the Province. To support the information the respondent must establish that these lands were vested in the Province by the B. N. A. Act, failing which the information must be dismissed, whether the lease or license granted by the dominion to the appellants conferred [605] a legal title or not. If therefore the respondent fails in making out the title of the province, it is not essential that the appellants should be able to shew that under some particular clause of the B. N. A. Act, the lands of which the locus in quo forms part were vested in the dominion. I am of opinion, however, that the ultimate Crown title in the lands described in sub-sect. 24 of sect. 91, whatever may be the true meaning of the terms employed (an inquiry yet to be entered upon), became, subject to the Indian title in the same, vested in the Crown in right of the dominion. The title and interest of the Crown in the lands specified in sub-sect. 24 at the date of confederation belonged to it in the rights of the

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respective provinces in which the lands were situated; for the reasons already given these lands were not vested in the new provinces created by the Confederation Act; they must therefore have remained in the Crown in some other right, which other right could only have been, and plainly was that of the dominion. For, having regard to the scheme by which the B. N. A. Act carried out confederation, by first consolidating the four original provinces into one body politic—the dominion—and then re-distributing this dominion into provinces and appropriating certain specified property to these several provinces, it follows that the residue of the property belonging to the Crown in right of the provinces before confederation not specifically appropriated by the appropriation clauses of the Act, sects. 109 and 117, to the newly created provinces, must of necessity have remained in the Crown, and it is reasonable to presume, for the use and purposes of the dominion. Next, inasmuch as all revenues, casual or otherwise, arising from the title and interest of the Crown in “Lands reserved for the Indians,” (whatever may upon subsequent consideration appear to [606] be the proper meaning of that expression) are by the effect of sect. 102 allotted to the dominion, this assignment of revenue to the dominion, according to a well understood rule of construction, implies a vesting of the land and property from which the revenue is to arise. This last mentioned construction, which is analogous to that so familiar in construing wills by which a gift of rents and profits is held to be equivalent to a gift of the land itself, was referred to with approbation in *Attorney-General v. Mercer* (1), though its application was excluded in that case for the reason that the right of escheat there was held to be expressly vested in the province under sect. 109, which cannot be the case as regards “Lands reserved for the Indians,” over which an exclusive power of legislation is conferred on the dominion, whatever may appear as the result of further consideration to be the proper meaning attributable to that expression.

The questions to be determined are therefore now restricted entirely to the construction to be placed on the words, “Lands reserved for the Indians,” in sub-sect. 24 of sect. 91, and we are to bear in mind, that whatever are the lands subjected by this description to the exclusive legislative power of the dominion they cannot be lands belonging to the province, since all these last mentioned lands are expressly subject to the exclusive legislative powers of the provinces. In construing this enactment we are not only entitled

(1) 8 App. Cas. p. 774; *anté*, vol. 3, p. 9.

but bound to apply that well established rule which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes to have recourse to external aids derived from the surrounding circumstances and the history of the subject matter dealt with, and to construe the enactment by the light derived from such sources, and so to put ourselves as far as possible in the position of [607] the legislature whose language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts it is manifest that the task of interpretation would degenerate into mere speculation and guess work.

It is argued here for the appellants, that these words "lands reserved for the Indians" are to have attributed to them a meaning sufficiently comprehensive to include all lands in which the Indian title, always recognised by the Crown of Great Britain, has not been extinguished or surrendered according to the well understood and established practice invariably observed by the Government from a comparatively remote period. The respondent, on the contrary, seeks to place a much narrower construction on these words and asks us to confine them to lands, first, which having been absolutely acquired by the Crown had been re-appropriated for the use and residence of Indian tribes, and secondly, to lands which, on a surrender by Indian nations or tribes of their territories to the Crown, had been excepted or reserved and retained by the Indians for their own residence and use as hunting grounds or otherwise. In order to ascertain whether it was the intention of parliament by the use of these words "lands reserved for the Indians" to describe comprehensively all lands in which the Indians retained any interest, and so to include unsurrendered lands generally, or whether it was intended to use the term in its restricted sense, as the respondent contends, as indicating only lands which had been expressly granted and appropriated by the Crown to the use of Indians, or excepted or reserved by them for their own use out of some large tract surrendered by them to the Crown, we must refer to historical accounts of the policy already adverted to as having been always followed by the Crown in dealings with the Indians in respect of their [608] lands.

In the commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal

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terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested. This short statement will, I think, on comparison with the authorities to which I will presently refer be found to be an accurate description of the principles upon which the Crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnston was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible directly to the Crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments down to the year 1867, when the Confederation Act constituting the Dominion of Canada was passed. So faithfully was this system carried out that I venture to say that there is no settled part of the territory of the Province of Ontario, except perhaps some isolated spots upon which the French Government had, previous to the conquest, erected forts, such as Fort Frontenac and Fort Toronto, which is not included in and covered by a surrender contained in some Indian treaty still to be found in the Dominion archives. These [609] rules of policy being shewn to have been well established and acted upon, and the title of the Indians to their unsurrendered lands to have been recognised by the Crown to the extent already mentioned, it may seem of little importance to enquire into the reasons on which it was based. But as these reasons are not without some bearing on the present question, as I shall hereafter shew, I will shortly refer to what appears to have led to the adoption of the system of dealing with the territorial rights of the Indians. To ascribe it to moral grounds, to motives of humane consideration for the aborigines, would be to attribute it to feelings which perhaps had little weight in the age in which it took its rise. Its true origin was, I take it, experience of the great impolicy of the opposite mode of dealing with the Indians which had been practised by some of the provincial governments of the older colonies and which had led to frequent frontier wars, involving great sacrifices of life and property and requiring an expenditure of money which had proved most burdensome to the colonies. That the more liberal treatment accorded to the Indians by this system of protecting them in the enjoyment of their hunting grounds and prohibiting settlement on lands which they had not surrendered, which it is now contended the British North America Act has put an end to, was successful in

its results, is attested by the historical fact that from the memorable year 1763, when Detroit was besieged and all the Indian tribes were in revolt, down to the date of Confederation, Indian wars and massacres entirely ceased in the British possessions in North America, although powerful Indian nations still continued for some time after the former date to inhabit those territories. That this peaceful conduct of the Indians is in a great degree to be attributed to the recognition of their rights to lands unsurrendered by them, and [610] to the guarantee of their protection in the possession and enjoyment of such lands given by the Crown in the proclamation of October, 1763, hereafter to be more fully noticed, is a well known fact of Canadian history which cannot be controverted. The Indian nations from that time became and have since continued to be the firm and faithful allies of the Crown and rendered it important military services in two wars—the war of the Revolution and that of 1812.

The American authorities, to which reference has already been made, consist (amongst others) of passages in the commentaries of Chancellor Kent (1), in which the whole doctrine of Indian titles is fully and elaborately considered, and of several decisions of the Supreme Court of the United States, from which three, *Johnson v. McIntosh* (2); *Worcester v. State of Georgia* (3); and *Mitchel v. United States* (4), may be selected as leading cases. The value and importance of these authorities is, not merely that they shew that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognise it as a continuance of the principles of law or policy as to Indian titles then established by the British Government, and therefore identical with those which have also continued to be recognised and applied in British North America. Chancellor Kent, referring to the decision of the Supreme Court of the United States, in *Cherokee Nation v. State of Georgia* (5); says —

“The court there held that the Indians were domestic, dependent nations, and their relations to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied until that right should be extinguished by a voluntary [611] cession to our government.” (6).

(1) Kent's Commentaries 12 ed. by Holmes, vol. 3, p. 379 *et seq.* and editor's notes.

(2) 8 Wheaton, 543.

(3) 6 Peters, 515.

(4) 9 Peters, 711

(5) 5 Peters, 1.

(6) 3 Kent Comms. 383.

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On the same page the learned commentator proceeds thus :—

“The Supreme Court in the case of Worcester reviewed the whole ground of controversy relative to the character and validity of Indian rights within the territorial dominions of the United States and especially in reference to the Cherokee nation within the limits of Georgia. They declared that the right given by European discovery was the exclusive right to purchase, but this right was not founded on a denial of the right of the Indian possessor to sell. Though the right to the soil was claimed to be in the European governments as a necessary consequence of the right of discovery and assumption of territorial jurisdiction, yet that right was only deemed such in reference to the whites ; and in respect to the Indians it was always understood to amount only to the exclusive right of purchasing such lands as the natives were willing to sell. The royal grants and charters asserted a title to the country against Europeans only, and they were considered as blank paper so far as the rights of the natives were concerned. The English, the French and the Spaniards were equal competitors for the friendship and the aid of the Indian nations. The Crown of England never attempted to interfere with the national affairs of the Indians further than to keep out the agents of foreign powers who might seduce them into foreign alliances. The English Government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands when they were willing to sell at a price they were willing to take, but they never coerced a surrender of them. The English Crown considered them as nations competent to maintain the relations of peace and war and of governing themselves under her protection. The United States who succeeded to the rights of the British Crown in respect to the Indians did the same and no more ; and the protection stipulated to be afforded to the Indians and claimed by them was understood by all parties as only binding the Indians to the United States as dependent allies.”

Again the same learned writer says (1) :

“The original Indian nations were regarded and dealt with as proprietors of the soil which they claimed and occupied, but without the power of alienation, except to the governments which protected them and had thrown over them and beyond them their assumed patented domains. These governments asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair

purchase, under the sanction of treaties ; and they held all individual purchases from the Indians whether made with them [612] individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the state, and a government grant was the only lawful source of title admitted in the courts of justice. The colonial and state governments and the government of the United States uniformly dealt upon these principles with the Indian nations dwelling within their territorial limits."

Further : Chancellor Kent, in summarising the decision of the Supreme Court in *Mitchel v. United States*, (1) states the whole doctrine in a form still more applicable to the present case. He says (2) :

"The Supreme Court once more declared the same general doctrine, that lands in possession of friendly Indians were always, under the colonial governments, considered as being owned by the tribe or nation, as their common property, by a perpetual right of possession ; that the ultimate fee was in the crown or its grantees, subject to this right of possession, and could be granted by the crown upon that condition ; that individuals could not purchase Indian lands without license, or under rules prescribed by law ; that possession was considered with reference to Indian habits and modes of life, and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies."

It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is, that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned ; in other words, that the dominium utile is recognised as belonging to or reserved for the Indians, though the dominium directum is considered to be in the United States. Then if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States Courts to have been originally enforced by the Crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, [613] in a state any less favourable to the Indians whose lands were situated within the dominion of the British Crown, the original

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(1) 9 Peters, 711.

(2) Page 386, note (a).

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author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognise the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States Courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such, and consequently, that the 24th sub-sect. of sect. 91, as well as the 109th sect. and the 5th sub-sect. of sect. 92 of the B. N. A. Act, must all be read and construed upon the assumption that these territorial rights of the Indians were strictly legal rights which had to be taken into account and dealt with in that distribution of property and proprietary rights made upon confederation between the federal and provincial governments.

The voluminous documentary evidence printed in the case contains numerous instances of official recognition of the doctrine of Indian title to unceded lands as applied to Canada. Without referring at length to this evidence, I may just call attention to one document which, as it contains an expression of opinion with reference to the title to the same lands, part of which are now in dispute in this cause by a high judicial authority, a former Chief Justice of Upper Canada, is of peculiar value. In the appendix to the case for Ontario, laid before the Judicial Committee in the boundary case (1) we find a letter dated 1st of May, 1819, from Chief Justice Powell to the Lieutenant Governor, Sir Peregrine Maitland, upon the subject of the conflict then going on between the North-west [614] and Hudson's Bay Companies, and of which the territory now in question was the scene. The Chief Justice, writing upon the jurisdiction of the Upper Canada courts in this territory, and of an Act of Parliament relating thereto, says:—

“The territory which it affects is in the Crown and part of a district, but the soil is in the aborigines, and inhabited only by Indians and their lawless followers.”

There cannot be a more distinct statement of the rights claimed by the appellants to have existed in the Indians than this, and if the soil, i. e., the title to the soil, was in the Indians in 1819, it must have so remained down to the date of the North-west Angle Treaty No. 3, made in 1873.

Then it is to be borne in mind that the control of the Indians and

(1) At page 134.

of the lands occupied by the Indians had, until a comparatively recent period, been retained in the hands of the Imperial Government. For some fifteen years after local self-government had been accorded to the Province of Canada the management of Indian affairs remained in the hands of an Imperial officer, subject only to the personal direction of the Governor-General, and entirely independent of the local government, and it was only about the year 1855, during the administration of Sir Edmund Head, and after the new system of government had been successfully established, that the direction of Indian affairs was handed over to the executive authorities of the late Province of Canada. Further, it is to be observed, that by the terms of the 24th sub-sect. the power to legislate concerning Indians as distinct from lands reserved, is expressly assigned to the Dominion Government, and this legislative power appears, by the tacit acquiescence of all the new governments called into existence by confederation, to include the burden of providing for the necessities of the Indians which has since been borne exclusively by the government of the Dominion. At all events, the [615] exclusive right of legislating respecting Indian affairs is thus attributed by this clause to the Parliament of Canada. This must include the right to control the exercise, by the Indians, of the power of making treaties of surrender, and since, as already shown, it is only by means of formal treaties that the Indian title can be properly surrendered or extinguished, parliament must necessarily have the power, as incident to the general management of the Indians, of so legislating as to restrain or regulate the making of treaties of surrender which might be deemed improvident dispositions of Indian lands. If this were not so, and parliament did not possess this power of absolute control over the Indians in respect of their dealings with their lands, the provisions of the 24th sub-sect. would be most incongruous and unreasonable, for in that case, whilst on the one hand parliament would have to provide for the necessities of the Indians, on the other hand it would not have the means of restraining these wards of the Dominion Government from wasting the means of self-support which their hunting grounds afforded. Then, taking into consideration this wide power of legislation respecting the Indian tribes, and seeing that it must necessarily include a power of control over all Indian treaties dealing with proprietary rights, it is surely a legitimate application of the maxim *noscitur a sociis* to construe the words "Lands reserved for the Indians" as embracing all territorial rights of Indians, as well those in lands actually appropriated for reserves as those in lands which had never been the subject of surrender at all.

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To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the Crown, were considered to possess a certain proprietary interest in the unsurrendered lands [616] which they occupied as hunting grounds ; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the colonial law as applied to Indian Nations ; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the Crown as the ultimate owner of the soil ; and that these rights of property were not inaptly described by the words " lands reserved for the Indians," whilst they could not, without doing violence to the meaning of language, be comprised in the description of public lands which the Provinces could sell and dispose of at their will. Further, we find from the conjunction of the word " Indians " with the expression " lands reserved for the Indians " in the 24th sub-section of section 91 of the British North America Act, that a construction which would place unsurrendered lands in the category of " public lands " appropriated to the Provinces would be one which would bring different provisions of the Act into direct conflict, since such lands would be subject to the disposition of the local legislature under sub-section 5, and at the same time it would be within the powers of the Dominion Parliament, in the exercise of its general right of legislation regarding the Indians, to restrain surrenders or extinguishments of the Indian title to such lands, and thus to render nugatory the only means open to the Provinces of making the lands available for sale and settlement. Then, there being but two alternative modes of avoiding this conflict, one by treating the British North America Act as by implication abolishing all right and property of the Indians in unsurrendered lands, thus at one stroke doing away with the traditional policy above noticed, and treating such lands as ordinary crown lands in which the Indian title has been extinguished, the other by holding that such unsurrendered lands are to be considered as embraced in the [617] description of " lands reserved for the Indians," it appears to me that the first alternative, which would attribute to the Imperial Parliament the intention of taking away proprietary rights, without express words and without any adequate reason, and of doing away

at a most inopportune time with the long cherished and most successful policy originally inaugurated by the British Government for the treatment of the Indian tribes, is totally inadmissible and must be rejected. The inevitable conclusion is, that the mode of interpretation secondly presented is the correct one, and that all lands in possession of Indian tribes not surrendered at the date of confederation are to be deemed "lands reserved for the Indians," the ultimate title to which must be in the Crown, not as representing the Province, but in right of the Dominion, the Indians having the right of enjoyment and an inalienable possessory title, until such title is extinguished by a treaty of surrender which the Dominion is alone competent to enter into. To these considerations must be added the further and weighty reason, that the construction just indicated is most fair and reasonable, inasmuch as the Dominion, being burdened with the support and maintenance of the Indians, ought also to have the benefit of any advantage which may be derived from a surrender of their lands.

To these arguments the respondent opposes others of varying weight and importance, which may, as far as I can see, be all classed under two heads. First, it is attempted to show by reference to a variety of documents, consisting of legislative and administrative acts, public correspondence and official reports, all of which I concede are quite admissible for the purpose, that the words "lands reserved for the Indians" had, at the time of confederation, acquired a well recognised secondary meaning, and that they were [618] synonymus with Indian reserves and were confined to lands appropriated to the Indians by grant from the Crown, or lands which the Indians had themselves reserved by excepting them from treaty surrenders. The answer to this is, in my opinion, very plain. It is true that these documents do show that lands so specifically appropriated to the Indians have always been treated and are to be considered as lands "reserved" for the Indians, and therefore lands comprised in the description given in the 24th sub-section of section 91, but it does not follow from this that the clear and undoubted title of the Indians to their peculiar interest in unsundered lands is not also included in the same description. The inference would rather be against a construction which would attribute to the Imperial Parliament the intention of making a purely arbitrary distinction between the two classes of Indian property, for if it is once admitted or established that the Indians have a proprietary interest in lands not surrendered by them, a point on which there can really be no serious doubt, the same reasons which induced Parliament to throw around the minor territorial interests

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of the Indians in the smaller classes of reserves the powerful protection of the Dominion Government, or rather stronger reasons than these, must also have applied to their more valuable and important territorial rights in unsundered lands.

The other principal argument relied upon for the respondent, is one derived from the supposed inconvenience which would result from the proprietary interest in this large tract of territory becoming vested in the Dominion Government. I can see no force in this. I am unable to see that any such result must necessarily, or is even likely, to follow, because the proprietorship of the soil in a large tract of land situate within the confines of a particular [619] Province, is vested in the Dominion, whilst the political rights, legislative and administrative, over the same territory, are vested in the provincial government. Instances of such ownership by a federal government within the limits and subject to the jurisdiction of local governments, provinces, or states, are easily to be found, and it has never been suggested that any political inconvenience, or clashing of jurisdiction, has resulted from them. In all the States of the American Union, except the original thirteen and seven others formed out of cessions of territory by original States, viz.: Maine, Vermont, Tennessee, Kentucky, West Virginia, Alabama and Mississippi, and Texas, (which was admitted to the Union, as a state already formed out of foreign territory,) the federal government was the original proprietor of the soil, and still remains so as regards ungranted lands. We may, therefore, presume that a system which has prevailed and still prevails in seventeen states of the Union, and which also exists in our own Province of Manitoba, and must likewise apply to all future Provinces formed out of the North-West Territory, cannot be so incompatible with the political rights of local governments, or with the material interests of the people, as to require us to depart from the ordinary and well-understood rule of statutory construction, and to ascribe to the Imperial Parliament the intention of abolishing by implication Indian titles which the Crown had uniformly recognised for a long course of time, and protection to which had been expressly ordained and guaranteed by a proclamation of the King more than a century old.

The objection, that the interests of the public would be prejudiced by attributing the ultimate crown title in Indian lands to the Dominion instead of to the Province, seems to imply that this dispute is to be considered as a continuance of the contest respecting the provincial boundaries of Ontario and Manitoba. I cannot [620] assent to this. The question between the two provinces was

one in which the rights of two distinct political communities, each representing separate and distinct portions of the general public of the Dominion, came into conflict. In the present case we are entitled, indeed bound, to assume that in the disposal of these lands for the purposes of settlement the interests of the public, as well the public of Ontario as of Canada at large, will be as well served by the Dominion as by the Province. I have already shown that the ownership by the Dominion of territory included within the limits of the Province, is in no way inconsistent with the political rights of the latter as regards government and legislation. The only real question, therefore, can be and is, that as to which government has the better title to the fund to be produced by the sale of these lands, and if, in construing the statute, we are to take into consideration arguments based on the fairness and equity of giving to one government rather than to the other the title to this fund, I have no hesitation in assigning the better right to the Dominion. I see nothing inequitable or inconvenient, but much the reverse, in a construction of the statute which has the effect of attributing the profits arising from the surrender and sale of Indian lands to the Dominion, upon which is cast the burthen of providing for the government and support of the Indian tribes and the management of their property, not only in the Provinces, but throughout the wide domain of the North-West Territories, rather than upon the Provinces, who are not only free from all liabilities respecting the Indians, but are not even empowered to undertake them and cannot legally do so.

So far as arguments derived from expediency, public policy, and convenience are to have weight in removing any ambiguity which may be fairly raised with reference to the meaning of the terms [621] "lands reserved for the Indians," there were some invoked by the learned counsel for the appellants which, in my opinion, far exceed in weight any of the same class put forward on behalf of the respondent. Is it to be presumed that by the 109th and 117th sects. of the B.N.A. Act, it was intended to abrogate entirely the well understood doctrine, according to which the Indians were recognised as having a title to the lands not surrendered by them, which had been acted upon for at least one hundred years, and which had received the express sanction of the Crown in a royal proclamation, wherein the Indians are assured that, to the end that they might be convinced of the King's justice and determined resolution to remove all reasonable cause of discontent, their lands not ceded to or purchased by the Crown should be reserved to them for their hunting grounds? And is it to be supposed that this was

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done of the mere motion of the Imperial Parliament, without any suggestion or request from the body of delegates assembled in the conference by which the terms and plan of confederation were settled, or otherwise from this side of the Atlantic? And can that be considered a reasonable construction which would attribute to Parliament the intention to make this great change, and thus to break faith with the Indian tribes by abrogating the privileges conferred by a proclamation which they had always regarded as the charter of their rights, just as Canada was on the eve of acquiring from the Hudson's Bay Company a large territory, which would place in subjection to the new dominion an Indian population far in excess of the aggregate of that contained in all the old Provinces together, a population which it would be of the utmost importance to conciliate, and which would be sure to be affected by any want of good faith practised towards the Indians of the Provinces? Before we can say that the language of the 24th sub-sect. of sect. 91 [622] is to receive the interpretation contended for by the respondent, we must be prepared to answer these questions in the affirmative. This I cannot bring myself to do, but I am compelled to prefer the plain primary meaning of the words in question contended for by the appellants, according to which lands reserved for the Indians include unsurrendered lands, or, in other words, *all* lands reserved for the Indians, and not merely a particular class of such lands.

To the objections just mentioned it is, however, answered, that all the obligations of the Crown towards the Indians incidental to their unsurrendered lands, and the right to acquire such lands and to make compensation therefor by providing subsidies and annuities for the Indians, attach to and may be performed by the Provinces as well as by the Dominion. The proper rejoinders to this have been already indicated, but may be more fully stated as follows: First, a construction which, without any adequate reason, would apportion the management of the Indians and their lands between two Governments and two sets of officers, whilst it is obvious that an administration of Indian affairs as a whole by one Government and one set of officers could alone be practicable and beneficial, would be so eccentric and arbitrary that nothing but express words could authorise it. Secondly, the Provinces are Governments of limited capacities, executive as well as legislative, and amongst the powers attributed to the Provincial Governments and Legislatures by the B.N.A. Act, none can be found which would authorise such a dealing with Indians in respect of their lands. It cannot be pretended that any such power is conferred in express terms, and none

can be implied, since such an implication would be in direct conflict with the only meaning which can be sensibly attached to the [623] word "Indians" as used in the 24th sub-sect. of sect. 91, considered apart altogether from the subsequent words "and lands reserved for the Indians," by which word "Indians," standing alone, it must have been intended to assign to the Dominion the tutelage or guardianship of the Indians and the right to regulate their relations with the Crown generally, a duty which could not be properly performed by the Dominion if the tribes were liable to be beset by the Provinces seeking surrenders of their lands. On the whole, therefore, the result is that the construction contended for by the respondent, that unsurrendered Indian lands vested in the Provinces, under the 109th and 117th sects. would practically annul the well recognised doctrine of an Indian title in these lands, and for that reason alone is therefore inadmissible.

It appears to me, therefore, that the contentions of the respondent entirely fail, and that were there nothing more to be said the appellants would be entitled to judgment on this appeal.

So far I have considered and dealt with the case upon the assumption that there were no extrinsic circumstances, documents, or course of conduct, from which we could derive assistance in placing a meaning upon the words of the 24th sub-sect., beyond the established usage of the Crown, according to which the Indians were considered as possessing the proprietary interest already referred to in their unsurrendered lands. It appears, however, that a much stronger case than this is made in favour of the construction contended for by the appellants, for we find that in the proclamation of King George III, (1) already incidentally alluded to, which had the force of a statute and was in the strictest sense a legislative act, and which had never, so far as I can see, been repealed, but remained, as regards so much of it as is now material, in force at the date of confederation, Indian lands not ceded to or purchased by the King, i.e., lands not surrendered, are expressly described in [624] terms as lands "reserved to the Indians;" the two expressions, "lands not ceded to or purchased by the king." and "lands reserved to the Indians," being expressly treated as convertible terms. This proclamation was that of the 7th of October, 1763, by which provision was made for the government of certain terri-

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(1) *Ante* vol. 3, p. 447.

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tories acquired by Great Britain by conquest during the seven years' war, and which had been ceded by the treaty of peace concluded at Paris between France, England and Spain, on the 10th February, 1763. By this proclamation four separate governments were established, viz., those of Grenada, East and West Florida, and Quebec, and the limits of each province were defined, those of Quebec not comprising the whole territory of Canada ceded by France, and being of much smaller extent than those afterwards ascribed to the second province of the same name by the Quebec Act passed in 1774 (1). The description of the territory included in the government of Quebec erected by the proclamation is as follows :

"First, the government of Quebec, bounded on the Labrador coast by the river St. John, and from thence by a line drawn from the head of that river, through the Lake St. John to the south end of the Lake Nipissim, from whence the said line crossing the River St. Lawrence, and the Lake Champlain, in 45 degrees of north latitude, passes along the high lands which divide the rivers that empty themselves into the said River St. Lawrence from those which fall into the sea; and also along the north coast of the Bayes des Chaleurs and the coast of the gulf of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the river St. Lawrence by the west end of the Island of Anticosti, terminates at the aforesaid river St. John."

This description, manifestly does not include the lands now in question

The proclamation after declaring that the King had issued Letters Patent to the Governors of these several colonies directing the calling of general assemblies for purposes of legislation and some other provisions immaterial here, proceeds to ordain certain [625] regulations respecting Indians and Indian lands, as follows :—

"And whereas it is just and reasonable and essential to our interest and the security of our colonies that the several nations or tribes of Indians with whom we are connected and who live under our protection should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds : We do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure, that no

(1) 14 G. 3, c. 83; ante vol. 3, p. 445.

Governor or Commander in Chief in any of our Colonies of Quebec, East Florida or West Florida, do presume, upon any pretence whatever, to grant warrants of survey, or pass any patents for lands, beyond the bounds of their respective Governments as described in their Commissions ; as also, that no Governor or Commander in Chief of any of our other colonies or plantations in America do presume for the present and until our further pleasure be known, to grant warrants of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic ocean from the west or north-west, or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

“ And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new Governments, or within the limits of the territory granted to the Hudson’s Bay Company ; as also all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid ; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

“ And we do further strictly enjoin and require all persons whatever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described or upon any other lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

“ And whereas great frauds and abuses have been committed in the purchasing lands of the Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians, in order therefore to prevent such irregularities for the future, and to the end that the Indians may be convinced of our justice and determined resolution to remove all reasonable cause of discontent, [626] we do, with the advice of our Privy Council, strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians

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within those parts of our colonies where we have thought proper to allow settlement; but that if at any time any of the said Indians should be inclined to dispose of the said lands the same shall be purchased only for us, in our name, at some public meeting or assembly of the said Indians, to be held for that purpose by the Governor or Commander-in-Chief of our colony respectively within which they shall lie."

This same proclamation was the subject of judicial consideration in the celebrated case of *Campbell v. Hall* (1), and its effect and operation was fully considered by Lord Mansfield in his judgment in that case.

As is well known, it was determined in the case of *Campbell v. Hall* (1), that the king had power to legislate as regards ceded and conquered colonies, and that this identical proclamation now under consideration had the force of law in the colonies to which it applied, though it was also determined, that the king, having by it ordained the calling of legislative assemblies in the several colonies mentioned, his power of legislation was thereby exhausted, and that a subsequent proclamation with reference to Grenada was of no legislative force. In the present case the importance of this proclamation is paramount, and appears to me to be by itself decisive of the present appeal. In the first place, it gives legislative expression and force to what I have heretofore treated as depending on a regulation of policy, or at most on rules of unwritten law and official practice, namely, the right of the Indians to enjoy, by virtue of a recognised title, their lands not surrendered or ceded to the Crown; it prohibits all interference with such lands by private persons by way of purchase or settlement, and limits the right of purchasing or obtaining cessions of Indian lands to the king exclusively. Next, by the words "to lands which not having been ceded to or purchased by us are still reserved to the said Indians as aforesaid," it indicates that "lands reserved for the [627] Indians" was a description and definition applicable to and indeed convertible with, unsurrendered or non-ceded lands. It thus furnishes us with a key to the meaning of the words "lands reserved for the Indians," an expression which appears to have originated in this proclamation, and it entitles us, whenever we find the same words used in a statute or public document, without

(1) 1 Cowper 204.

a context indicating that it is used in some restricted sense, to infer that it includes those rights of the Indians in their unsundered lands which it was one of the principal purposes of the proclamation to assure to them. If the effect of this proclamation as applicable to the present case stopped here it would, as it seems to me, be conclusive, for being a legislative act having the force of a statute it has never, in my opinion, been repealed, but has, so far as it regulates the rights of the Indians in their unsundered lands, remained in force to the present day. It was, therefore, in force at the date of the passage of the B. N. A. Act, and, if I am correct in this, I am warranted in saying, that, in the face of its express provisions that Indian lands not surrendered or ceded to the Crown shall be considered "lands reserved to the Indians," it is impossible to reject the equivalent interpretation that lands reserved for the Indians mean lands not ceded by the Indians, which is all the appellants contend for. But this proclamation has, as it appears to me, an application far beyond that already mentioned. It not only gives us a clue to the meaning of the term "lands reserved for or to the Indians," but it applies directly and in terms to the present lands. By the first clause of the extract from the proclamation which I have read the king declares it to be his will and pleasure to reserve under his sovereignty, protection and dominion, for the use of the said Indians, all land and territory not included (1) within the limits of "our said three new [628] governments," (2) or within the limits of the territory granted to the Hudson's Bay Company, (3) also all lands westward of the sources of the rivers which fall into the Atlantic ocean from the west and north-west. Now this territory of which the lands in question form part, and one controversy as to which was determined by the Order in Council of August, 1884, (1) was clearly not comprised within the limits of the first Province of Quebec, as those limits were defined by this proclamation of October, 1763, nor was it included within the territory granted to the Hudson's Bay Company, nor did it lie to the west or north-west of the sources of the rivers falling into the Atlantic ocean. Then what were the lands not included within the three governments, nor within the Hudson's Bay territory, to which the proclamation refers as being thereby reserved for the Indians? Clearly it has reference to the residue

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(1) See *ante*, p. 129.

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of the territories mentioned at the outset of the proclamation, viz., the "countries and islands ceded and confirmed to us by the said treaty." And if this is correct, and I fail to see how it can be otherwise, this identical tract of territory now in question was, by this proclamation, which in *Campbell v. Hall* (1) was adjudged to have legislative force, reserved to and set apart for the use of the Indians, and this provision of the proclamation, never having been repealed, nor in any way derogated from by any subsequent legislation, it remained in full force as a subsisting enactment up to the passing of the Confederation Act. In other words, it is a legislative act, applying directly to the lands now in question, assuring to the Indians the right and title to possess and enjoy these lands until they thought fit of their own free will to cede or surrender them to the Crown, and declaring that, until surrender, the lands should be reserved to them as their hunting grounds, and, being still in full force and vigour when the B. N. A. Act was passed, [629] it operated at that time as an express legislative appropriation of the land now in dispute for the use and benefit of the Indians by the designation of "lands reserved for the Indians." Therefore the effect of the 24th sub-sect. of sect. 91 of the B. N. A. Act upon these lands, as lands "reserved for the Indians" by the proclamation, must be precisely the same as if, by an Act of Parliament passed the day before the B. N. A. Act, it had been declared that these same lands, designated by some appropriate description, should be "reserved to the Indians;" in which case it could hardly be pretended that they were not lands "reserved for the Indians" within sub-sect. 24 of sect. 91, but public lands belonging to the Province under sects. 109 and 117 and subject to the exclusive legislation of the Province under sub-sect. 5 of sect. 92.

I now proceed to consider the objections which have been made on behalf of the respondent to the arguments based on the proclamation of 1763. First, it is said that the proclamation was wholly repealed by the Quebec Act passed in 1774 (2). To this proposition I cannot assent. The proclamation had made provision for the civil government of the Province of Quebec, which was created by it, and it had defined the boundaries of that Province; and it was these provisions, and these only, which were repealed, altered, or in any way affected by the Act of 1774. The repealing section, which is the fourth, is as follows:

(1) 1 Cowper 204.

(2) 14 Geo. 3, c. 83; *ante* vol. 3, p. 445.

“ And whereas the provisions made by the said proclamation in respect of the civil government of the said Province of Quebec and the powers and authorities given to the Governor and other civil officers of the said Province, by the grants and commissions issued in consequence thereof, have been found upon experience to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted at the conquest to above 65,000 persons professing the religion of the Church of Rome and enjoying an established form of constitution and system of laws by which their persons and property had been protected, governed and [630] ordered for a long series of years, from the first establishment of the said Province of Canada ;

“ Be it therefore further enacted by the authority aforesaid, that the said proclamation, so far as the same relates to the said Province of Quebec and the commission under the authority whereof the Government of the said Province is at present administered, and all and every the ordinance and ordinances made by the Governor and Council of Quebec for the time being relative to the civil government and administration of justice in the said Province, and all commissions to judges and other officers thereof, be and the same are hereby revoked, annulled and made void from and after the 1st day of May, 1775.”

From the wording of this section, as well that portion of it which consists of preamble as the enacting clause itself, it is plain that the intention was only to revoke so much of the proclamation as had relation to the civil government, the powers given to the governor, and other civil officers, and to the administration of justice in the Province. By the proclamation the law of England had been introduced into the new Province erected by the king out of the territory ceded by France. This had proved a cause of great dissatisfaction to the French-Canadian population, and had, as the fourth section recites, “ been found upon experience to be inapplicable to the state and circumstances of the Province.” One principal object of the Act was to remedy this grievance by providing (as it did) that in controversies as to property and civil rights the laws of Canada should be the rule of decision. The proclamation had also provided for the calling of legislative assemblies ; such assemblies being considered unsuited to the state of the Province, this provision was also superseded by enacting

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that the legislative power should be vested in a council composed of members appointed by the Crown.

Further, the Act greatly enlarged the boundaries of the Province, extending them westward to the Mississippi (as I may now venture to say) and southward to the junction of the Ohio and Mississippi. [631] It was this last provision which principally attracted attention to the measure in England, and led to great debates in Parliament, and particularly to the vigorous opposition of Mr. Burke, then the agent of the Province of New York (1). This extension of the limits of the Province was, as is well known, induced by considerations of policy connected with the discontent then prevailing in the adjoining English Provinces, whose people greatly objected to the Act and considered themselves much aggrieved by its passage.

It is nowhere suggested that anything connected with the questions of Indians or Indian rights led to its enactment. None of the changes in the terms of the proclamation which were introduced by the Act have the most remote bearing on Indian land rights or Indian affairs. Neither the establishment of French instead of English law, nor the substitution of a council for an assembly, nor the enlargement of the Provincial boundaries, can by implication have any such effect, and the Act does not contain a word expressly referring to the Indians. Further, the third section of the Act contains an express saving of titles to land, in words sufficiently comprehensive to include the Indian title recognised by the proclamation. Its words are :—

“ Nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title or possession derived under any grant, conveyance or otherwise howsoever, of or to any lands within the said Province or the Provinces thereto adjoining ; but that the same shall remain and be in force and have effect as if this Act had never been made.”

The words “ right,” “ title ” and “ possession,” are all applicable to the rights which the Crown had conceded to the Indians by the proclamation, and without absolutely disregarding this third section, it would be impossible to hold that these vested rights of property [632] or possession had all been abolished and swept away by the

(1) See printed papers in the toba pp. 371, 373, and Ontario matter of the boundary between appendix to same, p. 137. the Provinces of Ontario and Mani-

statute. I must therefore hold, that the Quebec Act had no more effect in revoking the five concluding paragraphs of the proclamation of 1763 which relate to the Indians and their rights to possess and enjoy their lands until they voluntarily surrendered or ceded them to the Crown, than it had in repealing it as a royal ordinance for the government of the Floridas in Granada.

Then it is said, that the proclamation was, as regards the Indians, merely a temporary measure, and that its character as such is evidenced by the introductory words to the clauses now material; "and we do further declare it to be our royal will and pleasure *for the present.*" There is no force in this point unless it can be shown that the proclamation was revoked in a regular and constitutional manner. A statute which makes provision "for the present," without any express limit in point of time, or other indication by which its duration can be ascertained, remains in force until it is repealed. As I have already said, we are bound to regard this proclamation as having all the force of a statute, and as such it must be subject to the established rules of statutory construction. No Act of Parliament. Order in Council, or Colonial statute or ordinance can be produced repealing, or assuming to repeal, so much of its terms as are applicable to the present question. We are therefore bound to conclude that, to the extent just indicated, it remained in full force and operation and had all the effect of an Act of Parliament up to the passing of the B. N. A. Act in 1867.

That the proclamation was not considered by the government and its officers to have been superseded by the Quebec Act, or otherwise, is shown by the strict observance of its terms in all dealings with the Indians respecting their lands. The Indians themselves [633] have been allowed to consider it as still of binding force, and to look upon it as the charter of their rights. In the report of the Indian Commissioners appointed by the Government of Canada, dated the 22nd January, 1844, and therefore made whilst the Indians were still under the protection of the Imperial Government, it is said:

"The subsequent proclamation of His Majesty George the Third, issued in 1763, furnished them with a fresh guarantee for the possession of their hunting grounds and the protection of the Crown. This document the Indians look upon as their charter. They have preserved a copy of it to the present time, and have referred to it on several occasions, in their representations to the Government.

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"Since 1763 the Government, adhering to the royal proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them and rendering them some compensation. For a considerable time after the conquest of Canada the whole of the western part of the Upper Province, with the exception of a few military posts on the frontier, and a great extent of the eastern part, was in their occupation. As the settlement of the country advanced and the land was required for new occupants, or the predatory and revengeful habits of the Indians rendered their removal desirable, the British Government made successive agreements with them for the surrender of portions of their lands."

It is not suggested that between 1814 and the passage of the B.N.A. Act any thing occurred to detract from the Indian rights. This constant usage for upwards of a century by itself raises a strong presumption in favour of the construction of the Quebec Act which I maintain, namely, that it had not the repealing effect contended for by the respondent. Further, in the case of *Johnson v. McIntosh* (1), decided in 1823, the Supreme Court of the United States had to deal directly with this identical point of the binding effect as a legislative ordinance of the proclamation of 1763, and with its operation at a date subsequent to the Act of 1774 upon Indian Lands included within the boundaries of the second Province of Quebec created by that Act. The lands there in question were within the territory which by the Treaty of Versailles (1783), settling the boundaries between Canada and the United States, became [634] part of the United States and was known as the Territory of Illinois, and these lands had been purchased from the Indians in 1775 and 1778, in contravention of the terms of the proclamation. It was objected that the title so acquired was thereby rendered void. Chief Justice Marshall, in giving the judgment of the Court, says:

"The proclamation issued by the King of Great Britain in 1763 has been considered, and we think with reason, as constituting an additional objection to the title of the plaintiff."

The Chief Justice then proceeds to consider the constitutional validity of the proclamation, which he recognises to have been well established by *Campbell v. Hall* (2), and upon that, as well as upon other grounds, he gives judgment against the title. Now if the

(1) 8 Wheaton, 543.

(2) 1 Cowper, 204.

Quebec Act, which, as it was a statute preceding in date the Declaration of Independence (1776), would have been considered in this respect binding by the American Courts, had repealed the proclamation, the Supreme Court would have been wrong in its conclusion that it applied to the case before them. It is out of the question to suppose that the Judges of the Supreme Court of the United States, several of whom were contemporaries of the Revolution and actors in it (notably the Chief Justice himself), were not perfectly familiar with a statute so notorious throughout the old colonies as the Quebec Act, which had been one of the pretended grievances set forth in the Declaration of Independence by way of justifying the revolution. We must therefore conclude that it was considered by the Court not to repeal or in any way affect the provisions of the proclamation relating to the Indians. Lastly, the learned Chancellor himself, in his judgment in this case, concedes that "the proclamation has frequently been referred to by the Indians themselves as the charter of their rights;" and, speaking of the clause "relating to the manner of dealing with them in respect of lands they occupy at large or as a reserve," he says it [635] "has always been scrupulously observed in such transactions," but still he adds that it had been repealed by the Quebec Act and had become obsolete. That so much of it as is now material was not repealed by the Quebec Act, according to the proper construction of that statute, I have, I think, sufficiently established; and that it could otherwise have become legally obsolete was impossible, since, if *Campbell v. Hall* (1) is to be considered sound law, it was a legislative ordinance of equivalent force with a statute, and consequently could only have been repealed by an Act emanating from some competent legislative authority; but no such Act can be referred to. That the proclamation ever in fact became practically obsolete from desuetude, is so far from having been the case that it is admitted to have remained since the Act of 1774 "operative as a declaration of sound principles which then and thereafter guided the executive in disposing of Indian claims."

But even if I am wrong in my view that the statute of 1774 had not the effect contended for, but that the proclamation was in point of law wholly revoked by it, there still remains the argument that its terms furnish a key to the meaning of the words used in the 24th sub-sect. of sect. 91 of the B.N.A. Act, upon the construction of

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which the decision of this appeal must wholly depend. Thus using the text of the proclamation as a glossary, we find that in 1763 lands reserved for the Indians meant lands not ceded or surrendered by them to the Crown. Then, as we find it generally admitted, that this proclamation, even if superseded, has down to the present time been regarded by the Indians as the charter of their rights, that it has remained operative as a declaration of sound principles, and that its terms have always been scrupulously observed in dealings with the Indians in respect of their lands (all of which are very nearly the learned Chancellor's own words) the result is inevitable, [686] that the expression "lands reserved for the Indians" employed in the proclamation retained its original significance as an equivalent for lands not ceded to or purchased by the Crown down to 1867 when the B.N.A. Act was passed, and that, consequently, when the same words were made use of in the 91st sect. of that Act, it was with the intention that they should receive the same definite and well understood meaning as had always been thus attached to them.

Some stress has been laid on the legislation of the Dominion since confederation, as indicating that the Parliament of Canada has adopted the construction of the B.N.A. Act contended for by the respondent. Even if this had been so, I am not aware of any principle upon which what may be considered an erroneous view adopted by Parliament of this question of the meaning of sub-sect. 24 of sect. 91 could bind this Court to adopt the same construction in a judicial decision, although; if there was room for doubt and there had in fact been any legislation, it would, as embodying the opinion of Parliament as to the proper interpretation of the Imperial Act, be entitled to some, though not conclusive weight and influence. It does not appear, however, that any such construction as is contended for by the respondent has, in fact, been placed by Parliament on the 24th sub-sect. of sect. 91. Three Acts relating to the Indians and Indian lands have been passed by the Parliament of Canada since confederation, in 1868, 1876 and 1880 respectively. In the first of these statutes, (31 Vict. c. 42), an Act organizing the Department of the Secretary of State, by sect. 6, all lands reserved for Indians, or for any tribe, band or body of Indians, are declared to "be deemed reserved and held for the same purposes as before this Act," and by sect. 8 it was provided, that lands reserved

for the use of the Indians should only be ceded to the Crown by a [637] formal treaty of surrender made in the manner prescribed by the Act, and that until surrender no sale or lease of Indian lands should be valid. In the subsequent Acts of 1876 and 1880 (1), the same provisions were repeated except that the word "reserves" was used instead of "lands reserved for the Indians," and by an interpretation clause it was declared that the term "reserve" meant "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of, or granted to a particular band of Indians, of which the legal title is in the Crown but which is unsurrendered." With regard to these Acts it is to be observed that in the first Act the identical expression calling for interpretation, "lands reserved for the Indians," is used. In the second and third the word "reserves" has been substituted, and what I understand to be contended, is that this word "reserves," with the meaning affixed to it by the interpretation clause, has a narrower signification than one which includes all unsurrendered lands. I am not prepared so to understand the word "reserves" as defined by the interpretation clause, for I cannot admit that it has a less comprehensive signification than the words "lands reserved for the Indians" in the Act of 1869, and these latter words must receive the same construction as is to be attributed to precisely the same words as used in the B.N.A. Act. But, conceding that the word "reserves" did apply to Indian lands of a different class from those referred to as "lands reserved for the Indians," what possible effect could that have on the present question, which is confined to the construction of an Imperial statute—the Confederation Act? That Parliament has no power to divest the Dominion in favour of the Provinces of a legislative power conferred on it by the B. N. A. Act is, I think clear. But, assuming that it had, it has neither assumed to put [638] forth any authoritative declaration of the proper construction of the clause in question in the B. N. A. Act, or to relinquish in favour of the Provinces any right of property or power of legislation vested in the Dominion by its provisions. At most, if my construction of the word "reserves" is erroneous, it could be said, that having the power to legislate for all lands occupied by and not surrendered by Indians, Parliament had only seen fit to exercise this power in relation to the class of lands comprised in the descrip-

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tion of "reserves" as defined by the interpretation clause, but on no principle that I ever heard or read of could this be said either to imply an authoritative declaration of the construction of the B. N. A. Act binding on the Courts, or a relinquishment in favour of the Provinces of the exclusive right of legislation regarding lands reserved for the Indians, or a cession to the Provinces of the rights of the Crown in such lands. These statutes have, therefore, no application to the question the Court is called upon to decide on this appeal.

On the whole my conclusion must be, that the lands included in the description of "lands reserved for the Indians," in sub-sect. 24 of sect. 91, were not vested in the Provinces as public lands or property by sects. 109 and 117, and that all lands occupied by Indians and not ceded by them to the Crown are comprehended in the exclusive powers of legislation conferred on the Dominion, and that the ultimate property in such lands, subject to the Indian title, is vested in the Crown for the use of the Dominion; that consequently the north-west angle Treaty No. 3 conferred an absolute title to the lands in question in this case on Her Majesty in right of the Dominion of Canada; and that this appeal must be allowed and the information dismissed in the Court below with costs in all the Courts.

FOURNIER J., concurred with RITCHIE, C. J.

[639] HENRY, J :—

I have not considered it necessary, in the view I entertain of this case, to prepare a written judgment, but may say, in starting, that I entirely approve of the judgment of the learned Chancellor, which, I think, embraces all the important points in the case.

I think that after the conquest of this country all wild lands, including those held by nomadic tribes of Indians, were the property of the Crown and were transferred to those who applied for them only by the Crown. It was never asserted that any title to them could be given by the Indians. In 1763, after the conquest, the Crown issued a proclamation by which all persons were prohibited from trading with the Indians in regard to purchase of lands, and it was declared that all such transactions should be void. The

Indians were not permitted to transfer any of their rights as to the land to any individual, and no such transfers were valid unless made by the Crown. These were restrictions on the rights of the Indians following the conquest of the country, and I refer to them with reference to the question whether or not the Indians could convey a title in fee simple of the lands in question to the Dominion Government, as contended for, or to any one else.

If the Province of Ontario owned these lands, subject to such rights, then arises another question, whether the purchase from the Indians by the treaty spoken of operated to give a title in them to the Dominion Government, or as an extinguishment of the rights of the Indians in favour of the Province of Ontario.

In the first place, I suppose nobody will assert that if a private individual entered upon any of the lands at any time the Indians could legally object, as the law does not permit them by any legal means to recover possession of the land, or recover damages for any trespass committed thereon. I mention this to show that the Indians were never regarded as having a title.

[640] In 1878 the Crown, in its wisdom, decided to hold these lands as a hunting ground for the Indians. In the first settlement of the country to assert sovereignty and to put that assertion into operation would have caused war, and it was necessary to treat with the Indians from time to time in order to facilitate settlement. They were, therefore, dealt with in such a manner that they were not asked to give up their lands without some compensation. The treaty in question was made when the Dominion Government claimed that the lands in question were not a part of Ontario, and many years before the Privy Council decided that they were. The Dominion Government, asserting that it was a portion of the territory of Manitoba over which they had jurisdiction (for, by arrangement, all the Crown lands and timber in Manitoba were reserved to the Dominion), entered into negotiations with the Indians for the extinguishment of their title. That being done we have to inquire what was the operation, in law, of that extinguishment.

Now, suppose an individual had purchased from the Indians a part of this territory the Crown would have the right to ignore the transfer. The Indians might have no further claim, but the extinguishment of the Indian rights would enure to the benefit of the Crown. If the Indian claim had been extinguished by private

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persons it would, without doubt, have operated in favour of the Crown. Apply that principle to this case and we will see that the extinguishment, if Ontario was the owner at the time, would in the same way operate in favour of the Province of Ontario.

This document signed by certain Indians is not evidence of a purchase. The conveyance itself shows that the title was in the Crown and the treaty is simply a cession of all the Indian rights, titles and privileges whatever they were, and the consideration is [641] stated to have emanated from Her Majesty's bounty, etc. The consideration was, therefore, on the face of the treaty, an act of bounty on the part of Her Majesty. It is not an acknowledgment of any title in fee simple in the Indians. The Indians were not in possession of any particular portion of the land; for years and years they might never be on certain portions of it; they could not be said to have yielded possession, for that they cannot be assumed to have had, but virtually only relinquished their claim to the lands as hunting grounds.

A question of importance arises under the Confederation Act. By one of the sections of that Act all lands *reserved for the Indians* were placed under the control of the Dominion Parliament. We must then inquire what was reserved for them. There are many ways of reserving real estate. It may be reserved by will, by deed, by proclamation, and so on, but it requires an act of some description. As regards the wild lands inhabited by nomadic tribes of Indians, by what process is it shown that they were ever *reserved* by anybody? They are in the same state as they were at the conquest. We find that several large tracts of land were at different times especially reserved for the use of Indian tribes, and have been held in trust for them by the Government. When the Indians did not require them they were sold and the money held for their use. There was another class. In many of the treaties by which the Indians gave up their right to portions of the country certain portions of the territory they were about to transfer were reserved for them in the treaties themselves. When, therefore, the Imperial Act was passed there was sufficient material for the operation of the clauses relating to lands "*reserved for the Indians.*"

But, I would ask, how can it be said that the lands in question in this suit were ever reserved? They were always the property of [642] the Crown. The Indians had the right to use them for hunt-

ing purposes but not as property the title of which was in them. Thus, then, we have these words in the statute explained by the knowledge we have of certain lands being expressly reserved for the Indians.

Reservation cannot be effected by implication; there must be some act.

The words in the Imperial statute refer only to lands expressly reserved, and the other wild lands in the country are not affected by the provision referred to.

These very lands belonged to the Province before confederation, but the right to them was contested by the Dominion Government. A mere dispute does not alter the question of title. And when the matter came before the Privy Council it was decided that the lands were part of the Province of Ontario. The result of that decision reverted back to the time of the passing of the Imperial Act. It was just as much the property of the Province all along as it would have been had no dispute arisen.

We have the Imperial Act which settles the whole question. All the lands, except those reserved in the Act itself, shall belong to the several Provinces. How, then, could the Dominion get a title to these lands? If the transfer from the Indians had never taken place no such question could or would have arisen, and the right of Ontario to the lands now contested would no doubt have been admitted. The mere transfer by the Indians to the Dominion Government of their rights cannot affect the title of Ontario.

I think, therefore, the right to grant licenses to cut timber on these lands was in no way given to the Dominion Government. If the lands are situate in Ontario they belong to Ontario, under the B. N. A. Act. So that all we have to enquire is: Was the land [643] a part of Ontario at the time of confederation? If it was, it is in the same position as any other wild lands in Quebec, Nova Scotia, or New Brunswick. The Dominion does not claim the lands in those other Provinces, and the mere surrender by the Indians could not give a title to those lands in Ontario.

As I stated before, I fully concur in the judgment of the learned Chancellor. If the lands in question belong to Ontario, and the Indian claims had not been extinguished, I maintain that it would be highly unconstitutional for the Dominion to interfere with them,

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as suggested, by the passage of an Act to prohibit the Indians from dealing with the Government of Ontario therefor.

For the reasons given, I am of the opinion that the appeal herein should be dismissed with costs.

TASCHEREAU, J. :—

I am also of opinion that the appeal should be dismissed.

The question involved has been so thoroughly reviewed by the learned Chancellor in the court of first instance, and by the learned judges of the Ontario Court of Appeal, that I feel unable to add to their observations almost anything but useless repetition.

There is no doubt of the correctness of the proposition laid down by the Supreme Court of Louisiana, in *Breaux v. Johns* (1), citing *Fletcher v. Peck* (2), and *Johnson v. McIntosh* (3), that “on the discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession, gave title to the soil to the government by whose subjects, or by whose authority, it was made, not only against other European Governments but against the natives themselves. While the different nations of Europe respected the rights (I would say [644] the claims) of the natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves.” I refer also to *Brooks v. Norris* (4), *Martin v. Johnson* (5), and *De Armas v. New Orleans* (6), in the same court.

That such was the case with the French Government in Canada, during its occupancy thereof, is an incontrovertible fact. The King was vested with the ownership of all the ungranted lands in the colony as part of the crown domain, and a royal grant conveyed the full estate and entitled the grantee to possession. The contention, that the royal grants and charters merely asserted a title in the grantees against Europeans or white men, but that they were nothing but blank papers so far as the rights of the natives were concerned, was certainly not then thought of, either in France or in Canada. Neither in the commission or letters patent to the Marquis de la Roche in 1578 and 1598, nor in the charter to the Cent Associés in 1627, nor in the retrocession of the same in 1663, nor in the charter to the West Indies Company in 1664, nor in the

(1) 4 La. An. 141.

(2) 6 Cranch, 87.

(3) 8 Wheaton, 543.

(4) 6 Rob. La. 175.

(5) 5 Mart. La. (O.S.) 655.

(6) 5 La. (O.S.) 132.

retrocession of the same in 1674, by which proprietary Government in Canada came to an end, nor in the six hundred concessions of seignories extending from the Atlantic to Lake Superior, made by these companies, or by the Kings themselves, nor in any grant of land whatever during the 225 years of the French domination, can be found even an allusion to, or a mention of, the Indian title.

On the contrary, in express terms, de la Roche was authorized to take possession of, and hold as his own property, all lands whatsoever that he might conquer from any one but the allies and confederates of the Crown, and, likewise, the charter of the West Indies Company granted them the full ownership of all lands [645] whatsoever, in Canada, which they would conquer, or from which they would drive away the Indians by force of arms. Such was the spirit of all the royal grants of the period. The King granted lands, seignories, territories, with the understanding that if any of these lands, seignories, or territories proved to be occupied by aborigines on the grantees rested the onus to get rid of them, either by chasing them away by force, or by a more conciliatory policy, as they would think proper. In many instances, no doubt, the grantees, or the King himself, deemed it cheaper or wiser to buy them than to fight them, but that was never construed as a recognition of their right to any legal title whatsoever. The fee and the legal possession were in the King or his grantees.

Now when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada and its islands, lands, places and coasts, including, as admitted at the argument, the lands now in controversy, it is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the crown domain, in as full and ample a manner as the King of France had previously owned it. That it should be otherwise for the lands now in dispute, I cannot see on what principle. To exclude from the full operation of the cession by France all the lands then occupied by the Indians, would be to declare that not an inch of land thereby passed to the King of England, as, at that time the whole of the unpatented lands of Canada were in their possession in as full and ample a manner as the 57,000 square miles of the territory in dispute can be said to be in possession of the 26,000 Indians who roam over it.

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[646] Now, when did the sovereign of Great Britain ever divest himself of the ownership of these lands to vest it in the Indians? When did the title pass from the sovereign to the Indians? Not by any letters patent. The appellants do not contend that any exist, but they contend that such was the effect of the royal proclamation of the 7th October, 1763. They fail, however, to establish that proposition. I cannot find in that document a single word that can be construed as a grant or to have the operation of a grant. The general provisions of this proclamation, it must not be lost sight of, did not apply to the territory now in controversy, for the Province of Quebec, thereby constituted, was bounded west at Lake Nipissing. But it is argued by the appellants that the following clauses support their contention :

“ And whereas it is just and reasonable and essential to our interest and the security of our colonies that the several nations or tribes of Indians with whom we are connected and who live under our protection, should not be molested or disturbed in the possession of such parts of our Dominions and Territories, as not having been ceded to or purchased by us are reserved to them or any of them as their hunting grounds, we do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure that no governor or commander-in-chief in any of our colonies of Quebec, East Florida or West Florida, do presume, upon any pretence whatever, to grant warrant of survey or pass any patents for lands beyond the bounds of their respective governments as described in their commissions ; as also that no governor or commander-in-chief of any of our other colonies or plantations in America do presume, for the present, and until our further pleasure be known, to grant warrant of survey or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic ocean from the west or north-west, or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

“ And we do further declare it to be our royal will and pleasure, for the present, as aforesaid to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company ; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea

[647] from the west and north-west as aforesaid ; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained."

Now, as I read these clauses, they, it seems to me, far from supporting the appellants' case, are entirely adverse to them. First, rather superfluously and unnecessarily, the governors are forbidden to issue any patents for lands beyond the bounds of their respective governments. This applies to crown lands of course. Then the governors are prohibited, for the present, from granting patents for any lands in the territory of the North-West, or for any lands whatever which, not having been ceded to or purchased by the Crown are reserved to the Indians or any of them. Now, all this clause necessarily refers to, is crown lands not previously conceded or granted ; the governors never have been presumed to even grant patents for lands that had previously passed from the Crown. It is to crown lands, to lands owned by the Crown but occupied by the Indians, that the proclamation refers. The words "for the present," in this and the next clause, are equivalent to a reservation by the King of his right, thereafter, or at any time, to grant these lands when he would think it proper to do so. He reserves for the present for the use of the Indians all the lands in Canada outside of the limits of the Province of Quebec as then constituted. Is that, in law, granting to these Indians a full title to the soil, a title to these lands? Did the sovereign thereby divest himself of the ownership of this territory? I cannot adopt that conclusion, nor can I see anything in that proclamation that gives to the Indians forever the right in law to the possession of any lands as against the Crown. Their occupancy under that document has been one by [648] sufferance only. Their possession has been, in law, the possession of the Crown. At any time before confederation the Crown could have granted these lands, or any of them, by letters patent, and the grant would have transferred to the grantee the plenum et utile dominium with the right to maintain trespass, without entry, against the Indians. A grant of land by the Crown is tantamount to conveyance with livery of seisin (1.) This proclamation of 1763 has not, consequently, in my opinion, created a legal Indian title.

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(1) *Doe Fitzgerald v. Finn*, 1 U. C.C.P. 230; *Rex v. Lelievre*, 1 C. Q. B. 70; *Greenlaw v. Fraser*, 24 Rev. de Jurisp. 506.

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From this result of my interpretation of it is unnecessary, for my determination of this case, to consider how far the sections of the proclamation to which I have alluded, have been affected by the Act of 1774 (1). I may, nevertheless, remark, that any right the Indians might have previously had could not, it seems, have been affected by this Act, as by its third section it is specially provided and enacted that "nothing in this Act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title, or possession derived under any grant, conveyance or otherwise howsoever, of or to any lands within the said Province, or the Provinces thereto adjoining."

It was further argued for the appellants that the principles which have always guided the Crown since the cession in its dealing with the Indians, amount to a recognition of their title to a beneficiary interest in the soil. There is, in my opinion, no foundation for this contention. For obvious political reasons, and motives of humanity and benevolence, it has, no doubt, been the general policy of the Crown, as it had been at the times of the French authorities, to respect the claims of the Indians. But this, though [649] it unquestionably gives them a title to the favourable consideration of the Government, does not give them any title in law, any title that a court of justice can recognise as against the Crown. If the numerous quotations on the subject furnished to us by the appellants from philosophers, publicists, economists and historians, and from official reports and despatches, must be interpreted as recognising a legal Indian title as against the Crown, all I can say of these opinions is, that a careful consideration of the question has led me to a different conclusion.

The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthropic considerations do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred

(1) 14 Geo. 3 c. 83 s. 4; *ante*, vol. 3, p. 445.

political obligation, in the execution of which the state must be free from judicial control.

The appellants' contentions, I may here remark, would appear to be supported by some extracts from the judgment of the Supreme Court of New Zealand, in the case of the *Queen v. Symonds* (June 1847,) which are to be found in the Imperial Parliamentary papers, 1860, vol. XLVII, p. 47, (Colonies New Zealand.) But the nature of the Indian title in New Zealand is a peculiar one. Art. 2 of a treaty with the Indians, known as the treaty of Waitangi guaranteed to them the full exclusive possession of all the lands occupied by them so long as they would desire to retain these lands, and [650] by the interpretation put upon that treaty by the Home Government, it was considered that the Indians had a right of proprietorship over their lands.

On the interpretation of the words "lands reserved for the Indians," in section 91, par. 24 of the B. N. A. Act, I adopt the reasoning of the Chancellor and of Chief Justice Hagarty. Even if such lands be specially reserved for the Indians, the title is in the Crown (1.)

The territory in dispute is not "reserved for the Indians" in the sense of these words as contained in that section. And even if the Indians had any interest in it, that would not affect the Province of Ontario's claim to it, as then the Province would, under the very words of sect. 103 of the B. N. A. Act, hold it subject to that interest.

As regards the question considered by Mr. Justice Burton, whether or not the Lieutenant-Governor in each Province is, as Her Majesty's representative under the B. N. A. Act, the only party who could extinguish the so called Indian title, if any there be, I refrain from expressing any opinion, for the reason that the point does not come up for our determination, and consequently that anything I might say about it would be entirely obiter.

Were these lands at confederation crown lands, or the private property of the Indians, is the abstract question to be determined. I am of opinion that they were crown lands, and consequently that

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(1) *Boulton v. Jeffrey*, 1 E. & A. (Ont.) 111; *Jackson v. Wilkes*, 4 Q. B. (O. S.) 142; *Bown v. West*, 1 E. & A. 117; *Totten v. Watson*, 15

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under sects. 109 and 117 of the B. N. A. Act they belong, as before confederation, to the Province of Ontario and form part of its public domain by title paramount.

GWYNNE, J. :—

[651] In 1763 the Board of Trade made a report to his then Majesty King George III, wherein they suggested a plan for the future management of Indian affairs in His Majesty's possessions in North America.

The plan suggested in this report was approved by His Majesty, and to give effect to it the proclamation of the 7th October, 1763, was issued, wherein is contained a declaration of His Majesty's Royal intentions towards the tribes of Indians in His Majesty's North American possessions. In that proclamation are contained the following passages (1.)

It has been argued that the above passages extracted from the proclamation had no effect within the limits of the then Province of Quebec, although that Province is specially mentioned in the proclamation. This argument was founded upon the contention, that the Indians were never recognised by the French Kings as having any estate, right, or title in the lands situate within the limits of the French possessions in North America, and that the English title to those lands being derived from the treaty of Paris of 1763, the title of the Crown of England to the lands ceded by the French King by that treaty is the same as the title which the Kings of France formerly had.

It may be admitted that the Kings of France recognised no title in the Indians in any part of the territory in the possession of the Kings of France, whose mode of dealing with the Indians was to make, *ex gratiâ*, crown grants of land for their conversion, instruction, and subsistence, but the fact that the Kings of France so dealt with the Indians presented no obstacle to the Sovereign of Great Britain, upon acquiring the French title, placing the Indians upon a more just and equitable footing, and recognising their having a certain title, estate and interest in the lands so acquired [652] by the Crown of Great Britain; and in point of fact this proclamation, ever since its issue, has been faithfully observed in its integrity, as well within the limits of the then Province of

(1) See *ante* p. 148.

Quebec, as in all other the British possessions in North America. At the time of the cession by the French the greater part of that portion of French Canada which now constitutes the Province of Quebec had been already granted by the French Kings. To lands so granted the proclamation, of course, had no application, but outside of those granted lands, if there were any Indians claiming title their rights, as declared in the proclamation, were respected.

By the Haldimand papers in the Canadian Archives it appears that in December, 1766, one Philibot, having an order of His Majesty in Council, dated June 18, 1766, directed to the Governor and Commander-in-Chief of the Province of Quebec, for a grant of 20,000 acres in that Province, petitioned the Governor, praying that the grant might be assigned to him, on the Restigouche at a place indicated by him, and the Committee of Council at Quebec having taken the matter of the petition into consideration reported that the lands so prayed to be granted to the petitioner "were or were claimed to be the property of the Indians, and as such, by His Majesty's express command as set forth in his proclamation of 1763, not within their power to grant." It is with that part of French Canada which now constitutes the Province of Ontario that we are at present concerned, and so inviolably has the proclamation been observed therein that it, together with the Royal instructions given to the Governors as to its strict enforcement, may not inaptly be termed the Indian Bill of Rights. By an order of His Majesty and Council, dated at St. James', May 4th 1768, transmitted to the Honourable Thomas Gage, Major-General and Commander-in-Chief [653] of all His Majesty's Forces in North America, he was ordered to

"Put Lieut. George McDougal, late of the 60th regt., in possession of Hogg Island, situate in Detroit River, three miles above the Fort of Detroit, provided that it can be done without umbrage to the Indians, and upon consideration that the Improvements projected by McDougal be directed to the more easy and effectual supply of His Majesty's Fort and Garrison maintained at Detroit."

The mode adopted on this occasion to extinguish the Indian title was, that General Gage forwarded the order to Capt. Turnbull, commanding at Detroit, with the following instructions as to the execution of it :—

"As Mr. McDougal's occupying these lands depends on the

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sufferance of the Indians who have claims thereto, it will be necessary that those Indians should be collected by the friends of Mr. McDougal and publicly signify to you, or rather give a written acknowledgment of, their consenting to the cession of these lands in favour of Mr. McDougal.

"This must be a solemn act, performed in your presence by Indians concerned in the property of these lands, to which they must sign the mark of their tribes, and you will certify the same to be done by you, under my authority and in your presence; their permission at the same time must be had to people the islands for cultivation, for every necessary particular should be mentioned in the writing for the cession of these lands, and the whole fully and distinctly explained to the Indians to prevent future claims or disputes."

In pursuance of the above instructions an indenture inter partes was made and executed by and between those chiefs of the Ottawa and Chippewa nations of Indians, of the one part, and George McDougal, of the other part, whereby it was witnessed that the said chiefs, for themselves and by the consent of the whole of the said nations of Indians, for and in consideration of property to the value of £194 10s., thereby acknowledged to have been received, did grant, bargain, sell, alien and confirm unto the said George McDougal, his heirs and assigns for ever, the said island in the Detroit River, about three miles above the fort, that he might settle, cultivate and otherwise employ it to his and his Majesty's [654] advantage, together with the houses, outhouses and appurtenances whatsoever to the said island, messuage or tenement and premises belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents and services of the said premises and every part thereof, and all the estate, right, title, claim and demand whatsoever of them the said Indians of, in and to the said messuage, tenement and premises and every part thereof, to have and to hold the said messuage, and all and singular the said premises above mentioned, and every part and parcel thereof, with the appurtenances, unto the said George McDougal, his heirs and assigns for ever, and the said chiefs did thereby engage themselves, their heirs, their nations, &c., for ever to warrant and defend the property of the said island unto the said George McDougal, his heirs, executors, administrators and

assigns for ever. In 1784, Governor Haldimand purchased from the Mississagas what is known as the Grand River tract and settled thereon the Six Nation Indians who, shortly after the close of the revolutionary war removed from their settlements in the State of New York into Canada.

In a letter dated at Quebec, the 26th April, 1784, addressed by Governor Haldimand to Lieut.-Governor Hay, on his departure from Quebec to enter upon his government, is the following paragraph defining his duty in relation to the Indians and their lands :

“The mode of acquiring lands by what is called Deeds of Gift is to be entirely discontinued, *for, by the King's instructions*, no Private Person, Society, Corporation or colony is capable of acquiring any property in lands belonging to the Indians, either by purchase, or grant or conveyance from the Indians, excepting only where the lands lie within the limits of any colony the soil of which has been vested in Proprietaries or Corporations by grants from the Crown ; in which cases such Proprietaries or Corporations only shall be capable of acquiring such property by purchase or grants from the Indians. It is also necessary to observe to you that, *by the King's instructions*, no purchase of lands belonging to [655] the Indians, whether in the name of or for the use of the Crown, be made, but at some general meeting, at which the Principal Chiefs of each Tribe claiming a property in such lands shall be present.”

In 1781, the form adopted for the surrender of the Island of Michilimakinak was a deed poll whereby four chiefs of the Chippewa nation, on behalf of themselves and all others of their nation the Chippewas “who have or can lay claim to the said Island,” surrendered and yielded up the said Island into the hands of Lieutenant-Governor Sinclair for the behalf and use of His Majesty George the Third, &c., &c., and his heirs for ever, and they did thereby make for themselves and posterity a renunciation of all claims in future to said Island. The deed contains the following clause :

“And we have signed two deeds of this tenor and date in the presence of (naming seven persons), one of which deeds is to remain with the Government of Canada and the other to remain at this post to certify the same, and we promise to preserve in our village a Belt of Wampum of seven feet in length to perpetuate,

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secure and be a lasting memorial of the said transaction to our nation for ever hereafter, and that no defect in this deed for want of law forms, or any other, shall invalidate the same."

This deed is signed by the Chiefs with their totems, according to Indian custom, and by the Lieutenant-Governor and a Captain, Lieutenant and Ensign of the 8th regiment. The last clause in the deed seems to have been inserted with the design of shewing on the face of the deed that the transaction had been authorised in a council of the nation. The obtaining such authority in the first place was the invariable custom, and then a deed was executed for the purpose of evidencing the transaction which the nation had authorised in council.

By the deed of surrender of about two million (2,000,000) acres along the shore of Lake Erie, executed on the 19th May, 1790, it appears to have been executed in a full council of the Ottawa, Chippewa, Pottawatani and Huron Nations, which was attended [656] by the commanding officer at Detroit, with a large staff of his officers as representing the Crown, and in their presence as subscribing witnesses the deed is executed in the Indian manner by eight Chiefs of the Ottawa, eight of the Chippewa, six of the Pottawatani and thirteen of the Huron Nations.

The deed is in the form of a deed-poll, commencing :

"Know all men by these presents that we, the Principal Village and War Chiefs of the Ottawa, Chippewa, Pottawatani, and Huron Nations. for and in consideration, &c. Have, by and with the consent of the whole of our said Nations, Given, granted, enfeoffed, alienated. and confirmed, and by these presents do give, grant, enfeoff, alien and confirm unto His Majesty George III., King, &c., &c., a certain tract of land (describing it), to have and to hold to the only proper use and behoof of his said Majesty, his Heirs and Successors for ever."

The deed contained a covenant for quiet enjoyment as follows:—

"And we, the said Chiefs for ourselves and the whole of our said Nations, and their Heirs do covenant, promise and agree to and with his said Majesty (for quiet enjoyment by His Majesty, his Heirs and Successors)."

And then concludes :

"And by these presents do make this our act and deed irrevocable under any pretence whatever, and have put his said Majesty

in full possession and seisin by allowing houses to be built upon the premises.'

The deed appears to have been recorded in the office of the clerk of the Crown, in the district of Hesse, on the 22nd day of June, 1790.

On the 7th of December, 1792, a deed was executed, which purports to be an indenture made between five Chiefs of the Mississaga Indian Nation, of the one part, and our Sovereign Lord George the Third, King etc., etc., of the other part, which recites an indenture, bearing date the 22nd day of May, 1784, made between the ten persons (naming them and describing them as Sachems, War Chiefs and principal Women of the Mississaga [657] Indian Nation), of the one part, and our said Sovereign Lord George the Third, King, etc., etc., of the other part, whereby the said Sachems, principal Chiefs and Women, in consideration of £1,180 7s. 4d., lawful money of Great Britain, did grant, bargain, sell, alien, release and confirm unto his said Majesty, his Heirs and Successors (certain lands therein particularly described); it then recites that there was found to be a certain error in that description, and that it was necessary and expedient that the boundary lines of the said parcel of land should be accurately laid down and described, the said chiefs, therefore, parties to the said deed of December, 1792, did thereby acknowledge and declare "That the true and real description of the said tract or parcel of land so bargained, sold, aliened and transferred by and to the parties aforesaid is all that tract or parcel of land lying and being, etc. (describing it by a corrected description), and therefore the said five chiefs (naming them) in consideration of the aforesaid sum of £1,180 7s. 4d., so paid as therein aforesaid, and of the further sum of five shillings to them in hand paid and for the better ratifying and confirming the thereinbefore recited indenture, did grant, bargain, sell and confirm unto his Majesty, his heirs and successors, all that tract of land (describing it by the corrected description), to have and to hold to His Majesty, his heirs and successors for ever."

The deed then contains the clause following :

"And whereas at a conference held by John Collins and William R. Crawford, Esquires, with the principal chiefs of the Mississaga Nation (Mr. John Rousseau as interpreter) it was unanimously

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agreed that the king shall have a right to make roads through the Mississaga country ; that the navigation of the said rivers and lakes shall be open and free for his vessels and those of his subjects ; that the king's subjects should carry on a free trade, unmolested, in and through the country ; now this indenture doth hereby ratify and confirm the said conference and agreement so had between the parties aforesaid, giving and granting to his said Majesty power and right to make roads through the said Mississaga country, together with the navigation of the said rivers and lakes for his vessels and those of his subjects trading thereon free and unmolested. In witness whereof the chiefs, on the part of the Mississaga Nation, and His Excellency John Graves Simcoe, Lieutenant-Governor of the said Province, etc., on the part of His Britannic Majesty, have hereunto set their hands and seals, etc., etc."

[658] The deed is executed by the four chiefs and the Lieutenant-Governor.

In the interval between the years 1792 and 1836 many instruments similar in character, some in the form of deeds poll by way of grant and surrender, and others in form of deeds of bargain and sale, were from time to time executed by the Indians in the customary Indian manner, whereby divers large tracts of country situate within the Province of Upper Canada were granted and surrendered and sold and transferred to the reigning sovereign for the time being in pursuance of resolutions passed in solemn councils of the respective nations of Indians occupying and claiming title to the lands so granted and surrendered. One of those deeds, which was executed by the Mississagas of the Bay of Quinté in 1836, when we reflect that the form of those surrenders has been in every case devised by officials acting on behalf of the Crown, and not by the Indians themselves, is very instructive as to the light in which the Indian title has always been regarded by the Crown. It is as follows :

" Know all men by these presents that we (here follow the names of five Indians), Sachems and chief warriors of the Mississaga tribe of Indians of the Bay of Quinté, in the Province of Upper Canada, in consideration of the trust and confidence by us reposed in His Most Gracious Majesty King William the Fourth, and in order that His said Most Gracious Majesty, his heirs and successors, may

grant and dispose of the lands and tenements hereinafter comprised and described for the benefit of the said Indians, in such manner and form, and at such price or prices, as to His Majesty his heirs and successors shall seem best, do remise, release, surrender, quit claim and yield up unto His Majesty King William the Fourth, his heirs and successors, all and singular those certain parcels of land (etc., etc., etc., describing them) to the end, intent, and purpose that the said lands and premises shall and may be granted and disposed of by his said Majesty, his heirs and successors, in trust, for the benefit of the said Indians and upon and for no other use, trust and intent or purpose whatsoever. In witness whereof we the said Sachems and chief warriors of the said Indians have hereunto set our hands and seals at Grape Island, in the Province [659] aforesaid, the 15th December, 1835."

The deed is executed by the five chiefs in the presence of J. B. Clench, then Superintendent of Indian Affairs, and two others.

In the month of August, 1836, Sir Francis Head, then Lieutenant-Governor of Upper Canada, deeming the resolution of the Indians in council assembled to be the material element in effectuating the extinction of the Indian title, dispensed with the subsequent execution of any deed, and obtained the surrender to the Crown of several large tracts of country by submitting certain propositions in writing (containing terms of surrender) to the Indians, to be considered by them in council, which, upon being approved and signed by the chiefs in council assembled, constituted the surrenders. In his reports communicating the surrenders to Lord Glenelg, then Colonial Secretary, the Lieutenant-Governor, after enumerating the tracts of land so acquired, says :—

"I have thus obtained for His Majesty's Government from the Indians, an immense portion of most valuable land."

Although the opinion entertained by Sir Francis Head that the act of the Indians in council was all that was necessary to effectuate the surrenders may be admitted to be correct, still in point of fact this would seem to have been the only occasion upon which deeds were dispensed with—unless the surrender by the Saugeen and Owen Sound Indians in 1854 can be considered another. The resolution in council in that case seems to have been prepared with the view of serving both as the resolution in council and a deed of surrender, for it is framed in the form of a deed—and, indeed, all

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the resolutions of the Indians in their councils, being signed by the chiefs with their totems according to Indian custom, may be regarded as deeds. The surrender of 1854 above referred to is in the following form :—

[660] “ We the chiefs, Sachems and principal men of the Indian tribes resident at Saugeen and Owen Sound confiding in the wisdom and protecting care of our Great Mother across the Big Lake, and believing that our good Father, His Excellency the Earl of Elgin and Kincardine, Governor-General of Canada, is anxiously desirous to promote those interests which will most largely conduce to the welfare of his Red children, have now, being in full council assembled, in presence of the Superintendent General of Indian Affairs and of the young men of both tribes, agreed that it will be highly desirable for us to make a full and complete surrender to the Crown of that peninsula known as the Saugeen and Owen Sound Indian Reserve subject to certain restrictions and reservations, to be hereinafter set forth.”

“ We have therefore set our marks to this document, after having heard the same read to us, and do hereby surrender the whole of the above named tract of country, bounded, etc., with the following reservations to wit—”

then followed those paragraphs describing three several blocks of land out of the tract, one for the occupation of the Saugeen Indians, another for the occupation of the Owen Sound Indians, and the third for the occupation of the Colpoy's Bay Indians.

The instrument then proceeded :

“ All which reserves we hereby retain to ourselves and our children in perpetuity. And it is agreed that the interest of the principal sum arising out of the sale of our lands shall be regularly paid, so long as there are Indians left to represent our tribe, without diminution, at half yearly periods. And we hereby request the sanction of our Great Father, the Governor-General, to this surrender, which we consider highly conducive to our general interests. It is understood that no islands are included in this surrender.”

This instrument was executed under the respective hands and seals of the Chief Superintendent of Indian Affairs and of the several chiefs, sachems, and principal men of the tribe.

In the interval between 1836 and the passing of the B. N. A. Act, several surrenders of large tracts of land were made by the Indians to the Crown by deeds executed by the chiefs and principal men of the tribes of Indians occupying and claiming title to such [661] lands. In some of the instruments so executed the Indians specially reserved to their own use and occupation, from the operation of the deeds of surrender, certain specified tracts within the limits of the tracts as described in the instruments. In some cases the surrenders were made, as in that of 1854 above set out, upon the express condition and trust that the moneys to be realized from sale of the lands surrendered should be applied by the Crown for the benefit of the Indians.

Now, in 1837, an Act, 7 Wm. 4, c. 118, was passed by the Legislature of the Province of Upper Canada, intituled "An Act to provide for the disposal of the *Public Lands* in this Province and for other purposes therein mentioned."

The Act was passed for regulating the issue of Letters Patent granting lands known as and designated "Crown Lands," "Clergy Reserves" and "School Lands," all of which lands were placed under the control of an officer styled the Commissioner of Crown Lands, and the proceeds arising from the sale thereof were to be accounted for by him to the Receiver General, as forming part of the public revenue of the Province. The Act did not affect any lands for the cession of which to His Majesty no agreement had been made with the Indian tribes occupying and claiming title to the same, nor any lands which, although surrendered by the Indians to the Crown, were so surrendered for the purpose of being sold and the proceeds applied for the maintenance of and benefit of the Indians themselves. These lands were all designated Indian Lands, and the sale of those surrendered to be sold for the benefit of the Indians themselves and the management and investment of the proceeds arising from their sale, were placed by the Crown under the management of a special officer called the Chief Superintendent [662] of Indian Affairs, who was under the direct supervision of the Lieutenant-Governor for the time being as representing Her Majesty, and who was accountable to the Imperial Treasury Department. The term "Public Lands," as used in the Act in relation to lands known as "Crown Lands," "Clergy Reserves" and "School Lands," as distinguished from those known as

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"Indian Lands," has been maintained in several Acts of the Legislature of the Province of Upper Canada, viz., 4 & 5 Vict. c. 100, 16 Vict. c. 159, Consolidated Statutes of Canada c. 22, 23 Vict. c. 2, and 23 Vict. c. 151. By this last Act it was enacted, that from and after the 1st day of July, 1861, the Commissioner of Crown Lands for the time being should be Chief Superintendent of Indian Affairs, and that all lands reserved for the Indians, or for any tribe or band of Indians, or held in trust for their benefit, should be deemed to be reserved and held for the same purposes as before the passing of the Act, but subject to its provisions, and that no release or surrender of lands reserved for the use of the Indians, or of any tribe or band of Indians, should be valid except upon condition that such release or surrender should be assented to by the chief or, if more than one chief, by a majority of the chiefs of the tribe or band of Indians assembled at a meeting or council of the tribe or band summoned for that purpose *according to their rules* and entitled to vote thereat, and held in the presence of an officer duly authorized to attend such council by the Commissioner of Crown Lands, and that nothing in the Act contained should render valid any release or surrender other than to the Crown; and it was further enacted that

"The Governor in Council may, from time to time, declare the provisions of the Act respecting the sale and management of "the Public Lands" passed in the present session, or of the twenty-third chapter of the Consolidated Statutes of Canada intituled "*An Act respecting the sale and management of the timber on Public Lands.*" [663] or any of such provisions, to apply to Indian Lands, or to the timber on Indian Lands, and the same shall thereupon apply and have effect as if they were expressly recited or embodied in this Act."

The inviolable manner in which the Indian title as declared by the proclamation of 1763 has been recognised amply justifies the language of the commissioners appointed by the Crown to report upon Indian affairs in the Province of Upper Canada in 1842 and 1856. The former commissioners in their report say:—

"The proclamation of His Majesty George the Third issued in 1763 furnished the Indians with a fresh guarantee for the possession of their hunting grounds and the protection of the Crown. This document the Indians look upon as their charter. They have

preserved a copy of it to the present time, and have referred to it on several occasions in their representations to the Government."

And again :—

"Since 1763 the Government, adhering to the Royal Proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them and rendering them some compensation."

The commissioners of 1856 in their report say :—

"By the proclamation of 1763 territorial rights, akin to those asserted by Sovereign Princes, are recognised as belonging to the Indians, that is to say, that none of their land can be alienated save by treaty made publicly between the Crown and them. Later, however, as this was found insufficient to check the whites from entering into bargains with the Indians for portions of their lands or for the timber growing thereon, it has been found necessary to pass stringent enactments for the protection of the Indian Reserves."

After the most explicit recognition by the Crown of the Indian title for upwards of a century in the most solemn manner—by treaties entered into between the Crown and the Indian nations in council assembled according to their national custom—and by deeds of cession to the Crown and of purchase by the Crown, prepared by officers of the Crown for execution by the Indians—it cannot, in my opinion, admit of a doubt that at the time of the passing of the B. N. A. Act the Indians in Upper Canada were acknowledged by the [664] Crown to have, and that they had, an estate, title and interest in all lands in that part of the Province of Canada formerly constituting Upper Canada, for the cession of which to the Crown no agreement had been made with the nations or tribes occupying the same as their hunting grounds, or claiming title thereto, which estate, title and interest could be divested or extinguished in no other manner than by cession made in the most solemn manner to the Crown. These cessions were made sometimes upon purchases made by the Crown for the use of the public, in which case the lands so acquired became "*Public Lands*," because the revenue to be derived from their sale was appropriated for the benefit of the public and was paid into the Provincial Treasury. Sometimes the cessions were made to the Crown upon trust for sale and

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investment of the proceeds for the benefit of the Indians themselves, and sometimes upon trust to grant to some person upon whom the Indians desired to confer a benefit for special services rendered to them; but all such lands, until the cession thereof should be made by the Indians to the Crown, constituted what were known as and designated "Indian Reserves," "Lands reserved for the Indians," or "Indian Lands." It is the lands *not ceded to or purchased by* the Crown which are spoken of in the proclamation of 1763 as *the lands reserved to the Indians for their hunting ground*—and the unceded lands have ever since been known by the designation "Lands reserved for the Indians," or "Indian Reserves."

When the Indians in the deeds or treaties by way of cession of land to the Crown reserved from out of the general description of the lands given in the instruments of cession, as they often did, certain particularly described portions of the lands so generally described, for the special uses, occupation or residence of particular [665] bands, the parts so reserved did not come under the operation of the deed or treaty of cession, but were reserved and excepted out of it and so continued to be just as they were before, lands not ceded to, or purchased by the Crown, and therefore remained still within the designation of "Lands reserved for the Indians," or "Indian Reserves."

It was not the exception of the particular parcels from the operation of the instrument of cession which made such parts come within designation of "Lands reserved for Indians" or "Indian Reserves," but because being so excepted, they remained in the position they were before, namely, lands not yet ceded to or purchased by the Crown.

Now the lands upon which the timber which is the subject of this suit was cut, although admitted to have been within the limits of the old Province of Upper Canada, were, at the time of the passing of the B. N. A. Act, lands for the cession of which to Her Majesty no agreement had been made with the Indian Nations or Tribes occupying the same as their hunting ground and claiming title thereto; the lands had not been ceded to or purchased by the Crown; they were not therefore "*Public Lands*" within the meaning of the statutes above referred to, viz:—4 & 5 Vict., c. 100, 16 Vict., c. 159, Con. Stat. C., c. 22, or 23 Vict., c. 2. It was not competent for the Provincial Government to have sold the

lands or any part thereof, for the lands, not having been yet ceded to or purchased by the Crown, did not come under the designation of "*Crown Lands*" within the meaning of the above Acts. No revenue could have been derived from the land which could have passed to the Province of Canada under the statute of 1846—9 Vict., c. 114—by which the Crown surrendered to the Provincial Legislature in exchange for a civil list all the casual and territorial [666] revenue of the Crown. The Indians, whenever they should cede those lands to the Crown might cede them only upon trust for sale and investment of the proceeds for the benefit of the Indians themselves, so that the public might never acquire any interest whatever in the moneys arising from the sale of the lands.

From these considerations it follows, in my opinion, as an incontrovertible proposition, that in lands situate as those lands were at the time of the passing of the B. N. A. Act, namely, lands which had not been ceded by the Indians to the Crown, the Province or Government of Ontario did not acquire by that Act any vested interest. The lands did not come within item No. 5 of sect. 92, nor within sect. 109 of the Act, but did, in my opinion, come within item 24 of sect. 91, which placed "*Indians and lands reserved for the Indians*" under the legislative control of the Dominion Parliament. The B. N. A. Act did not contemplate making, and has not made, any alteration in the relations existing of old between the Indians and Her Majesty, either in respect of the estate, title, and interest of the former in their lands not yet ceded to the Crown, or indeed in respect of any other matter, further than to place all matters affecting the Indians under the control and administration of Her Majesty's Government of the Dominion of Canada and the Parliament of the Dominion. The Provincial Government or Legislature having been given no control whatever over Indian affairs, the power of entering into a treaty or agreement with the Indians for obtaining from them a cession of the lands in question became vested in Her Majesty, freed from the operation of the Canada statute, 23 Vict., c. 151, which became null and of no further validity. The B. N. A. Act having removed the Indians and their affairs wholly from under the management [667] of a Provincial Commissioner of Crown Lands, such an officer could no longer be Chief Superintendent of affairs. The authorities of the Province of Ontario are invested by the B. N. A. Act with

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no jurisdiction whatever over the Indians, their lands or their affairs. All these matters are by the Act placed under the exclusive jurisdiction of the Dominion authorities. The power, therefore, of entering into a treaty between Her Majesty and the Indians for the cession to Her Majesty of their acknowledged title to any territory within the limits of the Province not yet ceded to the Crown can, since the passing of the B. N. A. Act, be exercised only either under the authority of an Act of the Dominion Parliament or, in the absence of such an Act, by Her Majesty acting through the instrumentality of the Governor-General of the Dominion as her representative and the Dominion Government, in whom and in the Indians claiming title to the land to be ceded must be vested the right of arranging the terms of the treaty of cession. It was in this manner that Her Majesty did enter into the treaty with the Indians for the cession of the lands upon which the timber grew, the right to which is in question now.

In the year 1873 a commission was issued by the Dominion Government to the Honourable Alexander Morris, then Lieutenant-Governor of Manitoba, Lieut.-Colonel Provencher, then Commissioner of Indian Affairs, and S. J. Dawson, Esq., then a member of the Dominion House of Commons, appointing them commissioners upon behalf of Her Majesty to treat with the Indians for the surrender to the Crown of the lands now under consideration, and at a council of the Indians held in the month of October, 1873, after three days spent in negotiating the terms of the cession, a treaty was concluded in the following terms :

" Articles of treaty made and concluded this third day of October, 1873, between Her Most Gracious Majesty the Queen of [668] Great Britain and Ireland by her commissioners, the Honourable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories, Joseph Albert Herbert Provencher and Simon James Dawson, of the one part, and the Saulteaux tribe of Ojibbeway Indians, inhabitants of the country hereinafter defined and described by their chiefs chosen and named as hereinafter mentioned, of the other part."

The treaty then recites the assembling in council of the Indians inhabiting the territory, and the appointment by them in council of twenty-four chiefs and head men (naming them) to conduct on their behalf negotiations for a treaty with Her Majesty's com-

missioners, and to sign any treaty to be founded upon such negotiations, and that the said commissioners and the said Indians had finally agreed upon and concluded a treaty as follows :

“ The Saulteaux tribe of the Ojibbeway Indians and all other the Indians inhabiting the district hereinafter described and defined do hereby cede, release, surrender, and yield up to the government of the Dominion of Canada for Her Majesty the Queen and her successors for ever all their rights, title and privileges whatsoever to the lands included within the following limits, that is to say :

(Here follows a description of the lands).

“ To have and to hold the same to Her Majesty the Queen and her successors for ever. And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band of Indians by the officers of the said government appointed for that purpose, and such selection shall be so made after conference with the Indians. Provided, however, that such reserve, whether for farming or other purposes, shall in nowise exceed one square mile for each family of five, or in that proportion for larger or smaller families, and such selection shall be made if possible during the course of next summer, or as soon thereafter as may be found [669] practicable, it being understood, however, that if, at the time of any such selection of any reserves as aforesaid there are any settlers within the bounds of the lands reserved by any Band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to the Indians, and provided also, that the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians with the consent of the Indians entitled thereto first had and obtained.

“ And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of her Indians, she hereby,

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through her commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.

“ And further Her Majesty agrees to maintain Schools for instruction in such reserves hereby made as to Her Government of her Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.

“ Her Majesty further agrees with her said Indians, that within the boundary of Indian Reserves, until otherwise determined by the Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold and all laws now in force, or hereafter to be enacted, to preserve her Indian subjects inhabiting the reserves, or living elsewhere within Her North-West Territories, from the evil use of intoxicating liquors, shall be strictly enforced.

“ Her Majesty further agrees with her said Indians that they the said Indians shall have the right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may, from time to time, be made by Her Government of the Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorised therefor by the said Government.

“ It is further agreed between Her Majesty and her said Indians that such sections of the reserves above indicated as may at any time be required for public works or building of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

“ And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tracts above [670] described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of Five Dollars per head yearly.

“ It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians.

“ It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any Band of the said Indians who are now actually cultivating the soil, or who shall hereafter commence to cultivate the land, that is to say (here follows the enumeration of several agricultural implements).

“ All the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.

“ It is further agreed between Her Majesty and the said Indians that each Chief duly recognised as such shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer not exceeding three for each Band shall receive fifteen dollars per annum, and each such Chief and subordinate officer as aforesaid shall also receive once in every three years a suitable suit of clothing; and each Chief shall receive, in recognition of the closing of this treaty, a suitable flag and medal.

“ And the undersigned chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and other subjects of Her Majesty, whether Indians or Whites, now inhabiting or hereafter to inhabit any part of the said ceded tract; and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

“ In witness whereof Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands

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[671] at the north-west angle of the Lake-of-the-Woods the day and year first herein above mentioned."

The treaty is thus co-executed by the three Commissioners and the twenty-four Indian chiefs in the presence of seventeen persons who subscribe their names as witnesses to the signatures of the several parties, and to the fact of the treaty having been first read over and explained by the Honourable James McKay. Now it is to be observed that the faith of Her Majesty is solemnly pledged to the faithful observance of this treaty, and the Government of the Dominion of Canada is made the instrument by which the obligations contained in it, which are incurred by and on behalf of Her Majesty, are to be fulfilled. The land ceded supplies the primary and indeed, the only source from which the funds required to maintain the schools contemplated by the treaty, and to meet all the other pecuniary payments and obligations incurred, can be raised. The benefits received and to be received by the Indians under the treaty are in effect so many fruits issuing from their own acknowledged estate and interest in the lands ceded. The administration and management of the estate constituting the source from which the funds required to meet the obligations incurred by the treaty must remain under the control of the Dominion of Canada, which, alone, by the B.N.A. Act, has jurisdiction in relation to the Indians and their affairs, at least until a sum shall be realised which, in the judgment of Her Majesty's Government of the Dominion having the obligations of the treaty imposed upon them, shall be deemed sufficient to supply for all time to come the necessary funds. That portion of the ceded territory which shall be composed of the contemplated reserves, equal in extent to one square mile for every family of five, if sold, being to be sold for the benefit of the Indians [672] themselves, must be sold by the Dominion Government, upon whom is imposed the duty of investing and administering the proceeds for the benefit of the Indians interested in each particular parcel; but if the contention of the Province of Ontario is to prevail the whole ceded tract, which constitutes the source from which alone the obligations incurred by the Dominion Government by the treaty can be fulfilled, becomes upon the passing of the B.N.A. Act and by force of that Act absolutely and exclusively the property of the Province of Ontario, and therefore the Dominion of Canada have not and cannot have any control over

these lands either for the purposes of the treaty or any other purpose. The Dominion, therefore, can have no control over, nor can the Indians have any interest in, the reserves contemplated in the treaty of one square mile for every family of five. If any part of the ceded tract became by the B.N.A. Act the property of the Province of Ontario, as is contended, these reserves did equally with all other parts, for all of it was then in the same condition, and the contention of the Province in substance and effect is, that by force of the B.N.A. Act the whole territory, upon the passing of that Act, became the property of the Province of Ontario, and that therefore, no part of it, not even the contemplated reserves, can be affected by the terms of the treaty, which cannot affect the rights acquired by the Province under the B. N. A. Act. To obtain a judicial decision to the above effect, by what appears to me a strange procedure, Her Majesty's name is used by the Province for the purpose of having the treaty which has been solemnly entered into by Her Majesty with the Indians, and for the faithful observance of which, Her Majesty is solemnly pledged to the Indians, declared to be void and of none effect.

[673] The learned Chancellor of Ontario, in his judgment pronounced in this case, draws from certain language of mine in *Church v. Fenton* (1) the conclusion that the lands now under consideration cannot come within item 24 of sect. 91 of the B.N.A. Act as "*lands reserved for the Indians*," but that language, read in the sense which was intended by me, leads to the contrary conclusion. The contention of the plaintiff in that case was, that the land in question there which was part of the tract ceded by the Saugeen and Owen Sound Indians by the above recited treaty of 1854, did come within that item, and that therefore it was not liable to be sold for mere payment of taxes. The point adjudged was, that from the time that a contract of sale of the lot in question to a purchaser was entered into, by the chief superintendent of Indian affairs, after the cession by the Indians of the land for sale for their benefit, the interest of the purchaser became liable to taxation precisely as the interest of a purchaser of Crown lands would be, and that the patent for the lands in question having been issued to the purchaser before the sale for taxes under which the defendant claimed took place, the title of the defendant under that sale must prevail. In the course

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(1) 28 U. C. C. P. 384 ; *ante* vol. 1, p. 831.

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of my judgment I expressed the opinion that lands surrendered by the Indians, as the tract under consideration there was, for the purpose of being sold, although when sold the proceeds arising from the sale, were to be applied for the benefit of the Indians, did not come within the designation of "lands reserved for the Indians" within item 24 of sect. 91 of the B.N.A. Act, that expression being as, I thought, more appropriate in relation to "*unsurrendered lands*" than to lands in which the Indian title had been extinguished.

[674] Lands for the cession of which to Her Majesty no agreement had been made with the tribes occupying and claiming title to the same, and which were situate within the limits of the old Province of Upper Canada, have always been, in my opinion, considered to come within the designation of "lands reserved for the Indians," or "Indian reserves," or "Indian lands." These lands have always been regarded as Indian hunting grounds. My object was to draw a distinction between lands not ceded by the Indians to the Crown and those which had been ceded by them; lands coming within the latter class, not being in my opinion, within the item 24 of sect. 91, while those of the former class, to which the lands now under consideration did belong at the time of the passing of the B.N.A. Act, do come within that item.

The Proclamation of 1763, which may be called the Indians' Bill of Rights, treats these uncaded lands as being "lands reserved for the Indians as their hunting grounds," and as such they have always been regarded in that part of her Majesty's dominions which formerly constituted the Province of Upper Canada, within the limits of which old Province it is admitted that at the time of the passing of the B.N.A. Act the tract under consideration was situate.

Upon the whole, therefore, I am of opinion that the tract in question did not become "public lands belonging to the Province of Ontario" by force of the B.N.A. Act; that the right to sell the said tract, or any part thereof, and to issue Letters Patent therefor or the right to sell the timber growing thereon, did not pass to the Province of Ontario by force of the Act; that the Indian title in the tract remained the same after the passing of the Act as it had been before; that the Indians had an estate, title, and interest in [675] the tract as their hunting ground, declared and acknowledged in the most solemn manner by all the sovereigns of Great Britain

since the proclamation of 1763, which precluded the Provincial Government from interfering therewith in any manner, and which title, estate and interest could only be divested and extinguished by a cession made in solemn manner by the Indians to Her Majesty; that the B.N.A. Act did not invest the provincial authorities of Ontario with power or right to enter into any treaty with the Indians for the cession of such their estate, title and interest to Her Majesty; that such power and right remained in Her Majesty to be exercised by her through the instrumentality of her Government of the Dominion of Canada and her representative the Governor General; that the treaty of October, 1873, entered into with Indians for the cession of the tract in question is obligatory upon the Dominion Government who are bound to fulfil the obligations therein contained upon the part of Her Majesty to be fulfilled, and for such purpose are entitled to deal with the lands and the timber growing thereon, unless and until some contract be entered into between the Government of the Province of Ontario and the Dominion Government for the acquisition by the Province of a beneficial interest in any revenue to be derived from the sale of the said lands or of the timber growing thereon.

The Province of Ontario not having acquired such beneficial interest by the B.N.A. Act nor by the terms of the treaty, such beneficial interest can, in my opinion, be acquired only by contract with the Government of the Dominion.

The latter part of sect. 109 of the B.N.A. Act, viz: "Subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same," applies, in my opinion, only to [676] lands beneficially belonging to the Province at the time of the Union, that is to say "public lands" the revenues arising from the sale of which (the lands having been already ceded by the Indians to the Crown) formed part of the public revenue of the Province, and has no application to lands which at the time of the passing of the B.N.A. Act had not been ceded by the Indians to the Crown. But, assuming that part of sect. 109 to have any application in the present case, then, as it appears to me, the "trusts" and "interest" in the sentence referred to must be held to be the "purposes" mentioned in the treaty, in consideration of which the cession was made, and the interest which the Indians have in the due fulfil-

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ment of the terms of the treaty, of which the Dominion Government are the trustees, and are, therefore, entitled to hold the property ceded in the terms of the treaty of cession as their security and means of executing the trust imposed on them. unless and until some agreement shall be entered into between the Provincial Government and them. In fine, I am of opinion, that at the time of the commencement of this suit the Provincial Government had not, and that they have not now, any vested interest in the timber which is the subject of this suit, and that, therefore, their suit or claim must be dismissed with costs, and that this appeal be allowed with costs.

JUDGMENTS IN ONTARIO COURT OF APPEAL.

[*Reported 13 App. Rep. 148.*]

HAGARTY, C. J. :—

For a clear understanding of the case before us we are very much indebted to the learned Chancellor for the very clear, full and well arranged statement with which he prefaces his judgment. The field to be travelled over is necessarily very extensive. He has mapped it out with so much care and perspicacity as to very much reduce the labours of subsequent investigators. We may fully accept his historical treatment of the subject from the earliest period down to the Confederation Act of 1867. The review of the authorities as to the true nature and extent of the alleged "Indian Title" may well warrant our full acceptance of the conclusion at which the learned Chancellor has arrived on this important branch of the case.

[149] We have then to consider the effect of the Confederation Act, and to glance at the existing position of the vast territories then moulded into a new constitutional form by Imperial legislation.

The north-western boundary of the Province of Ontario had not then been clearly ascertained and it was not known whether the tract of country, which we may call the North West Angle, was or was not within Ontario. The Indian tribes were sparsely scattered over that region, and the rest of the northern continent to the Rocky Mountains. No surrender of Indian rights had been made, and according to the settled practice of the United Provinces

of Canada—evidenced and sanctioned by repeated statutes, no attempt appears to have been made to grant titles or encourage settlement so long as the Indian claim was unextinguished.

We must except from this general statement any grants or titles from or under the Hudson's Bay Company.

The Confederation Act declares (sect. 6) that the part of Canada which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario.

Sect. 91. The Dominion Parliament may make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, and the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects thereafter enumerated. No. 24 of these reads—"Indians and Lands reserved for the Indians."

Sect. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects thereafter enumerated. No. 5—"The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon." No. 13. "Property and civil rights in the Province."

Sect. 109. "All lands, mines, minerals and royalties belonging to the several Provinces . . . at the Union, and all sums then [150] due or payable for such lands, mines, minerals or royalties shall belong to the several Provinces . . . in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same."

Sect. 117. "The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country."

Schedules are attached to the Act as to Provincial Public Works and property to be the property of Canada, such as canals, harbours, and including (No. 9) "property transferred by the Imperial Government and known as Ordnance Property." No. 10. "Armouries, drill sheds, . . . and land set apart for general public purposes." Another schedule specifies certain assets and properties which are to belong to Quebec and Ontario jointly.

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Reference is made to these schedules to show the particularity with which the disposition of property was dealt with and the improbability of any rights to extensive properties being omitted.

In considering the effect to be given to the claim of Ontario, to these lands unsurrendered at confederation to be part of the public domain, it may be well to refer to certain references in our statutes. In 1839 an Upper Canada Act, 2 Vict. c. 15, was passed as to trespassing on lands of the Crown, and allowing proceedings against persons illegally possessing themselves of any of the ungranted lands or lands appropriated for the residence of Indians, and to lands for the cession of which to Her Majesty no agreement had been made with the tribes occupying the same and who may claim title thereto.

12 Vict. c. 9, Canada 1849, declaring as to the foregoing Act, that it was to extend to all lands in that part of this Province called Upper Canada, whether surveyed or unsurveyed, etc., and whether such lands be part of those usually known as Crown Reserves, Clergy Reserves, School Lands, or Indian Lands, etc., whether [151] held in trust for the use of the Indians or of any other parties, etc., and it expressly repeals any limitation in the first section of the Act of 1839.

1860—23 Vict. c. 2, s. 38—"The term 'Public Lands' shall be held to apply to lands heretofore designated or known as Crown Lands, School Lands, Clergy Lands, Ordnance Lands (transferred to the Province) which designations for the purposes of administration shall still continue."

Sect. 9 allows the Governor in Council to declare the provisions of the Act, or any of them, to apply to "the Indian Lands under the management of the Chief Superintendent of Indian affairs," and the Chief Superintendent "shall, in respect to the said Indian Lands, have the same powers as the Commissioner of Crown Lands has in respect to Crown Lands." In former Acts, such as Con. Stat. Canada, c. 23, s. 7, as to trespassers, the expression is "Crown, Clergy, School or other Public Lands." In a Public Land Act of 1849, 12 Vict. c. 31, s. 2, as to the effect of a receipt for purchase money from the Commissioner of Crown Lands it is enacted that it shall extend to "Sales of Clergy Reserves, Crown Reserves, School Lands and generally to sales of all lands of what nature, kind or description soever of which the legal estate is or shall be in the

Crown, and the sale thereof is or shall be made by any Department of the Government or any officer thereof, for or on behalf of Her Majesty, her heirs or successors whether such land be held by Her Majesty for the public uses of the Province, or in the nature of a trust for some charitable or other public purpose." These latter words are omitted in the next Land Act, 16 Vict. In the session of 1860 was passed 23 Vict. c. 151, Reserved Act—it declared that the Commissioner of Crown Lands should be chief Superintendent of Indian Affairs.

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Sect. 2. All lands reserved for Indians or for any tribe or band of Indians or held in trust for their benefit, should be deemed to be reserved for the same purposes as before the Act, but subject to its provisions.

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[152] Sect. 3. All moneys or securities applicable to the support or benefit of the Indians, etc., and all moneys accrued or hereafter to accrue from the sale of any lands reserved or held in trust as aforesaid, shall, subject to the provisions of this Act, be applicable to the same purposes and be dealt with in the same manner as they might have been applied or dealt with before this Act.

Sect. 4 declared that no release or surrender of lands reserved for the use of Indians, etc., shall be valid except assented to by the chiefs (as directed) at a meeting in presence of an officer, duly authorized to attend by the Commissioner of Crown Lands, to be duly certified and returned to the Commissioner of Crown Lands.

Sect. 6. Nothing in the Act is to make valid any release or surrender other than to the Crown.

Sect. 7 allows the Governor-General to declare the provisions of 23 Vict. c. 2 or c. 23 Con. Stat. Canada, as to sale and management of timber on public lands, to apply to Indian Lands or to the timber on Indian Lands.

Sect. 8. He may also direct how, and in what manner, and by whom the money from sales of Indian Lands and from the property held or to be held in trust for the Indians, shall be invested, etc., and for the general management of such lands and moneys and to set apart therefrom for the construction or repair of roads passing through such lands and by way of contribution to schools frequented by such Indians.

We may refer to these Acts as shewing the state of the law at confederation.

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Much has been changed by Dominion legislation since that period.

The subsequent Dominion legislation may be referred to as indicative of the views of the framers of the Statutes.

In 1868, the 31 Vict. c. 42, (D) substitutes the Secretary of State as Superintendent General of Indian Affairs, and the learned Chancellor points out the language in which "lands reserved for Indians . . . or held in trust for their benefit, shall be deemed to be [153] reserved and held for the same purposes as before the passing of this Act ; and no such lands shall be sold, alienated, or leased until they have been released or surrendered to the Crown."

The Act of 1870, 33 Vict. c. 3, (D) establishing the Province of Manitoba was passed before any treaty was effected with the Indians for that portion of the North West. It provides that after the transfer by the Queen's Proclamation of Rupert's Land, and the North West Territory to Canada (which was dated 23rd June, 1870), the new Province shall be formed.

Sect. 30 declares that all ungranted or waste lands in the Province shall be vested in the Crown and administered by the Government of Canada, etc.

Sect. 31 declares that towards the extinguishment of the Indian title to lands in the Province, the Lieut.-Governor might select lots or tracts to the extent of 1,400,000 acres for the half-breed residents.

Sect. 32. And that all grants by the Hudson's Bay Company in freehold should be confirmed, and all persons in peaceable possession of tracts of lands at the time of the transfer in those parts of the Province in which the Indian title had not been extinguished, should have the right of pre-emption thereto, etc.

By the terms of the arrangement with the Hudson's Bay Company large quantities of land had been declared by the Imperial and Dominion authorities to be the company's property absolutely. I refer to this statute and to these arrangements as a noteworthy commentary on some of the arguments addressed to us as to the extent of the alleged "Indian Title" to all unsurrendered lands. The treaties with the Indians affecting this part of the North West were in 1871. But the Act passed prior to the treaty specifically appropriates large tracts of land.

The Chancellor properly refers to the Dominion Act of 1876, as to the definition of "Reserve" declared by sub.-sect. 6, sect. 3, to mean any tracts of land "set apart by treaty or otherwise for the [154] use or benefit of, or granted to a particular band of Indians of which the legal title is in the Crown but which is unsurrendered."

Sub.-sect. 8. "The term 'Indian Lands' means any reserve or portion of a reserve which has been surrendered to the Crown."

These definitions are repeated in 1880, 43 Vict. c. 88 (D).

I think the Chancellor has placed the right interpretation on the words in the British North America Act, "Indians and Lands reserved for the Indians." They cannot, in my judgment, be held to embrace the enormous territories then lying beyond the settled or surveyed lands of Ontario. I adopt the language of the judgment appealed from on this head, and consider that the whole course of Canadian legislation, both before and after confederation, has stamped a definite meaning on the words "Indian Reserves" or "Lands reserved for the Indians." That, in effect such words do not cover lands which have never been the subject of treaty or surrender, and as to which the Legislature or Executive Government have never specifically appropriated or "reserved" for the Indian population.

The Confederation Act professed only to unite the then Provinces of Canada, Nova Scotia, and New Brunswick in a federal union "with provision for the eventual union of other parts of British America." The territory embraced within the boundaries of these Provinces we may consider as alone affected by the special provisions in the Act for the appropriation and division of property. The territory in this north-west angle, was at that time unsurveyed and its legal boundary unascertained. It was eventually found to be within the Province of Ontario, representing the old Upper Canada. The well understood "Indian title" had never been surrendered, and no part of it, as far as I can understand from the evidence, had been treated as "reserved" for special Indian use or purpose. Territorially it was of course part of Ontario.

The main contest before us, is whether it did not thereby become part of the public domain of Ontario. The appellants have to con- [155] tend, as they do, that inasmuch as the Indian title had never been extinguished it still remained excluded from the dominion of Ontario, and could only be dealt with or disposed of by the Federal

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Government—that it did not form part of the “public lands belonging to Ontario.” The consequences would be that it remained the property of the Dominion—that that power alone could grant any portion of the soil or timber and it must be at its pleasure when or at what date, if ever, the Indian title should be extinguished by its action, and the same result would follow, if at the time of confederation one-half or more of the Province of Ontario, clearly within its boundaries, had remained with the alleged Indian title unsurrendered. Difficulties may be suggested and may arise whichever of the opposing contentions may govern our decision. I do not propose to consider them further than the decision of the point in controversy requires.

If these lands passed under the British North America Act to Ontario our decision must be against this appeal. It is not sufficient to hold that without this Act the lands in question in 1867 fall properly within the designation of “Public Lands” as such words are used in some of our statutes. We must take the whole Act together and ascertain as far as we can from its whole scope and bearing how far it decides this controversy. The sub-sect. 5, already quoted, must be read with sect. 109 as to “lands, mines, minerals and royalties.” And sect. 117, as to the Provinces retaining “all their respective public property not otherwise disposed of by this Act, subject to the right of Canada to assume any lands or public property for fortifications, etc.” As to the words in sect. 109, “subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same,” they do not in my opinion help the appellants. I cannot hold that any trust or interest in the legal sense in which we are bound to regard them, can be said to have then existed or affected these lands, as waste lands of the Crown. We are not called on to decide whether Ontario could or could not before the extinguishment of the alleged Indian title, enter upon or sell these lands.

[156] The treaty of 1873 has settled that matter. In *Attorney-General v. Mercer* (1) Lord Selborne says: “The fact that exclusive powers of legislation were given to the Provinces as to ‘the management and sale of the public lands belonging to the Province’ would still leave it necessary to resort to sect. 109 in order to determine what those public lands were.” He cites sect. 109, and

(1) 8 App. Cas. p. 776; ante vol. 3. p. 12.

discussing what "lands" are meant he says : " They evidently mean lands, etc., which were at the time of the Union in some sense and to some extent publici juris and in this respect they receive illustration from another section the 117th (which their Lordships do not regard as otherwise very material)—' The several Provinces shall retain all their respective public property not otherwise disposed of in this Act subject to the right of Canada to assume any *lands or public property* required for fortifications, or for the defence of the country It was not disputed on the argument for the Dominion at the bar that all territorial revenues arising within each Province from ' lands ' (in which term must be comprehended all estates in land) which at the time of the Union belonged to the Crown were reserved to the respective Provinces by sect. 109 ; and it was admitted that no distinction could in that respect be made between Crown Lands then ungranted and lands which had previously reverted to the Crown by escheat."

Again in reference to sect. 109 he says : (2) " The general subject of the whole section is of a high political nature ; it is the attribution of royal territorial rights for purposes of revenue and government to the Provinces in which they are situate or arise. It is a sound maxim of law that every word ought *prima facie* to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context."

I think the general scope of Lord Selborne's remarks strongly favour the opinion that the whole effect of the Act was to vest the ungranted lands of the Crown within the bounds of Ontario in the ownership of that Province, and that no sound reason exists for exempting the unsurrendered lands over which the very sparse Indian population was scattered.

[157] Assuming that the treaty making power rests wholly with the Dominion Government, and for the purposes of this case only, assuming that the appellants are right in asserting that until the Indian claims be extinguished the territory cannot properly be entered upon or occupied under either Government, I still feel great difficulty in agreeing that when the extinguishment takes place the territory and its timber remain or rather, become, the property of the Dominion. Believing, as I have stated, that the Union Act declared that all within the territorial limits of Ontario

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become the property of this Province subject to any trust, etc., I feel myself forced to the conclusion that when the Dominion Government in 1873, extinguished the Indian claims, such action must be held to enure to the benefit of the Province in which is the legal ownership of the land thus relieved from an alleged burden.

The Confederation Act and subsequent Imperial legislation left the general Government of Canada in full possession of the immense North-West Territories. It left each Province in the legal ownership of all the territory comprised within its limits, with certain carefully specified exceptions. The Indian treaty of 1873 extended over part of Ontario as well as a large part of territory not included in any existing Province. Unfortunately at that time the true boundaries had not been ascertained. Had it been otherwise we might naturally suppose that some understanding would have existed between the Local and the General Government as to a distribution of the burdens undertaken by the latter in extinguishing the Indian claims. But I cannot see how the absence of any such provision can alter the legal result.

If I hold otherwise I must decide that the fact of a burden, less or greater, being undertaken, necessarily affects the title to the released territory. If, as has occurred before in Indian treaties, the bargain had been that the Indians should remove altogether from the north-west angle to other lands assigned to them in the [15th] more distant regions, the argument would be equally strong for declaring the surrendered lands to remain for ever in the hands of the General Government, although an integral part of Ontario, and wholly freed from the presence of a single Indian. I think we must assume under the known uncertainty as to true boundaries, that the treaty was made by the Dominion as it were, "for the benefit of all concerned."

I cannot consider that we are dealing with the case of two rival claimants for the separate beneficial enjoyment of a valuable estate. I look upon the position of the Federal Government in a case like this, as that of a power entrusted with large legislative authorities to be exercised, so far as the Provinces are concerned, for their general benefit. If any Province had a portion of its territory, as fixed by the paramount authority of the Union Act, encumbered or embarrassed by an Indian claim, it would be I assume the duty of the Federal Government to endeavour to relieve it therefrom.

The omission to make some provision for a fair share of the cost or burden, cannot, I think, affect the question.

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The peculiar facts of this case suggest it as one eminently calling for some amicable arrangement in view of the great public interests. I do not underrate the difficulties presented by these facts. The treaty seems clearly to have been made on the assumption that the Dominion had the whole control of the surrendered territory. For example we find a clause by which Her Majesty agrees that the Indians shall have the right to hunt and fish over the tract surrendered, subject to such regulations as may, from time to time, be made by the Dominion Government, except over such tracts, etc., required for settlement, etc., by the Government, or by her subjects duly authorized by such Government. (1)

This latter clause could, I presume, be carried out in good faith by arrangement between the two Governments. I think the appeal must be dismissed.

[159] BURTON, J. A.:—

The case, when we come to understand the facts, does not present any very formidable difficulties, although a perusal of the reasons for and against the appeal, and the numerous authorities cited in them might well impress one at first with the idea that it was beset with intricacies and complications. It is a case in which we are again called upon to place a construction upon the British North America Act, but the first objection of the learned counsel for the appellants is a very startling one. viz.: That the Act can have no application to the lands in question inasmuch as at the time of confederation the title to them was in the Indians, and that it consequently could not pass under the Act which professed to deal only with lands which were the property of the former Provinces. In other words that a tract of country of over one hundred thousand square miles in extent, about one half of which by the recent decision of the Privy Council was held to be within the confines of Ontario, and which was supposed hitherto to belong to the Provinces of Ontario and Quebec, was owned by the small body of Indians, less than four thousand in number, who were roaming over it at large in their primitive state, and occupying it merely as hunting or fishing grounds.

(1) See Morris's Indian Treaties, p. 323.

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It would require very strong authority to induce any Court to come to such a conclusion, and whatever dicta there may be in American text books or decisions in support of such a view, I think it is the first time that such a contention has been urged in a British Court of Justice. Nor do I think the decisions in the United States warrant any such conclusion. It was stated in *Fletcher v. Peck*, (1) arguendo, that the Indian title was a mere occupancy for the purpose of hunting. It is not like our tenure, they have no idea of a title to the soil itself. It is overrun by them rather than inhabited. Citing Vattel, c. 1, ss. 81 and 209, bk. 2, sect. 97; Montesquieu, bk. 18, ch. 12; Smith's "Wealth of Nations," bk. 5, ch. 1. It is a right not to be transferred but extinguished. And Marshall C. J. in delivering judgment refers to the question [160] merely in this way: "The Court is of opinion that the nature of the Indian title, which is certainly to be respected by all Courts until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State." And in 1823 the same eminent Judge again discusses the question in an able and exhaustive judgment from which the learned Chancellor has made some extracts.

The whole discussion and judgment in that case are very interesting and instructive. Counsel referred to the practice of all civilized nations to deny the right of the Indians to be considered as independent communities having a permanent property in the soil. And it was said in argument that the North American Indians could have acquired no proprietary interest in the vast tract of territory which they wandered over, and their right to the lands on which they hunted could not be considered as superior to that which is acquired to the sea by fishing in it; the use in the one case as in the other is not exclusive. According to every theory of property the Indians had no individual right to the land; nor had they any collectively, or in their national capacity, for the lands used by each tribe were not used by them in such manner as to prevent their being appropriated by settlers.

The learned Judge in the course of his able judgment referred to the exclusive power of the Crown to grant lands, though in the occupation of the Indians before the Revolution as being undoubted, and then adds: "The existence of the power must negative the

(1) 6 Cranch 87, (Feb. 1810)

existence of any right which may conflict with and control it. An absolute title to lands cannot exist at the same time in different persons or in different Governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." I am aware that there are to be found in some [161] of the United States decisions expressions which would seem to place the so called Indian title on a higher footing, but I think that it is met by the extract I have made from Chief Justice Marshall's judgment that, "an absolute title cannot exist at one and the same time in different persons or in different Governments," and that in truth the recognition of any right in the Indians has been on the part of the Government a matter of public policy determined by political considerations, and motives of prudence or humanity and has not been a recognition of property in the soil capable of being transferred. That has always been the view taken of their rights in this country, and so far back as 1858, the late Sir John Robinson in giving judgment in *Totten v. Watson*, (1) very clearly enunciates the opinion that the Indians had no title even as regards *the lands reserved for them*, and which as he expresses "they are merely permitted to occupy at the pleasure of the Crown."

Mr. McCarthy contended that the principles upon which the Crown had been accustomed to deal with the Indians since the cession had been so well established, and so uniformly and continuously exercised as to have grown into a right. There is no question that the same humane policy which the Imperial Government pursued in reference to them has been faithfully observed by the old Province of Canada from the time that the jurisdiction passed to them, and I have no doubt will still be continued whether the jurisdiction be with the Provinces or the Dominion, all that we are at present concerned with is, that this right, whatever it may be, is not a title to the land, and that by sect. 109 of the British North America Act, the lands being within the limits of that portion of the old Province of Canada which now constitutes

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(1) 15 U. C. Q. B., 392.

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the Province of Ontario, belong to that Province subject to any trusts at the time of the passing of the Act existing in respect thereof, and to any interest other than that of the Province to the same. Sect. 109 became necessary in consequence of Ontario and [162] Quebec having previously to confederation formed but one Province and on their becoming disunited it became necessary to assign to each the property each should have. Apart from this the plain and obvious intent and spirit of the Act is, that all lands situate within a Province continued to belong to the Province with the exception of those which were specifically transferred to the Dominion and set forth in a schedule, and as if to place this beyond all question, sect. 117 declares that the several Provinces shall retain all their respective public property not otherwise disposed of in the Act subject to the right of the Dominion to assume any lands or public property required for fortifications or the defence of the country.

Mr. McCarthy further contended that they did not pass to the Province, inasmuch as they were "Lands reserved for the Indians" as described in sub-sect. 24 of sect. 91, and so became the property of the Dominion, and that up to the time of the making of treaty No. 3 it was clear that neither the Executive nor Legislature of the Province had any power to deal with them; and that the Governor-General could alone represent the Crown in treating with the Indians, and could alone accept a surrender from them. I am not prepared to accede to either proposition. It by no means follows that because exclusive jurisdiction to legislate in reference to property, the subject matter of sect. 91, is given by that section to the Parliament of Canada, the property itself should vest in the Dominion. On the contrary Parliament, as I have already pointed out, has clearly and specifically defined what property shall go to the Dominion, and "lands reserved for the Indians" are not in the schedule so defining it. But the first proposition seems to assume the whole question in controversy, viz., what is meant by the words "Lands reserved for the Indians."

I certainly should not have thought of resorting to the proclamation of 1763 for the definition of the words in question, which at the time of confederation had acquired a well understood meaning which had been repeatedly recognised in the statutes and public documents of the Provinces, and in the first Act passed by the

[163] Dominion Parliament upon the subject, they treated their jurisdiction as confined to such lands as had been reserved for Indians, or for any tribe, band or body of Indians or held in trust for their benefit, and eight years subsequently when they consolidated the laws respecting Indians, they passed interpretation clauses in which the terms "Reserve" and "Special Reserve," and Indian Lands are thus clearly defined, viz :

(6) "The term 'Reserve' means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals, or other valuables thereon or therein.

(7) "The term 'Special Reserve' means any tract or tracts of land, and everything belonging thereto, set apart for the use or benefit of any band or irregular band of Indians, the title of which is vested in a society, corporation or community legally established, and capable of suing and being sued, or in a person or persons of European descent, but which land is held in trust for or benevolently allowed to be used by such band or irregular band of Indians.

(8) "The term 'Indian Lands' means any reserve or portion of a reserve which has been surrendered to the Crown," indicating very clearly that the Government and Parliament of the Dominion adopted the construction which had always been attributed to the words in the Provinces, and their own construction of the language of the Imperial Act.

But I understand the learned counsel for the appellants to push his argument to the extent of saying that the Imperial authorities kept so jealous a control over the Indians and their affairs, that they would not have entrusted the Provinces with the power of treating for the extinguishment of their rights. The best answer to that argument is : that many years before confederation those authorities had handed over the control of the Indians to the [164] Provinces and that the division of the Dominion and Provincial powers was settled by delegates from the several Provinces, the Imperial Parliament having little more to do with the matter than to give legal effect to the agreement then arrived at by the delegates. The main feature of the scheme of division being to give to the Dominion power to legislate upon subjects of national interest, or matters common to all the Provinces and to the Provinces power

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to deal with matters of a local or private nature. It was reasonable therefore that the power to legislate for Indians generally throughout the Dominion should be vested in the central authority, and that the same power should deal with the lands which the Provinces had reserved or set apart for them, but this power was expressly limited to such subjects. It would have been very unlikely that the delegates would have consented to place the power of legislation in reference to the large unorganized tracts of public lands like that in question in the hands of the Dominion. If then the lands in question passed, or to speak more accurately remained part of the Province of Ontario, it would seem to follow almost as of course that the Provincial and not the Dominion authorities were the parties and the only parties who could extinguish the so-called Indian title in the absence of any express power to the Dominion to deal with it. We were referred to the case of *Lenoir v. Ritchie* (1)—more commonly known as the Great Seal case—as authority against the Lieutenant-Governor of a Province having power to deal with such a matter on behalf of Her Majesty. Whenever a case involving the grave issues which were presented for decision in that proceeding comes before us under similar circumstances we shall be bound to follow that decision, but I must respectfully decline to adopt the views expressed by some of the Judges in that case as to the limited powers of the Lieutenant-Governors and of the Legislatures of the Provinces.

It was intended that each of the Provinces at the time of confederation should stand upon the same footing as to constitutional and proprietary rights.

[165] The 12th sect. provides that all the powers, authorities and functions which under any Act of Parliament were vested in or exercisable by the respective Governors or Lieutenant-Governors, shall as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in or exercisable by the Governor-General; whilst the 65th sect. vests the same powers in the Lieutenant-Governors of Ontario and Quebec as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec, as were formerly exercised by the Governor-General. This became necessary, as before confederation the Province of Canada (now

(1) 3 Can. S. C. R. 575; *ante* vol. 1, p. 488.

Ontario and Quebec) formed only one Province, presided over not by Lieutenant-Governors but by the Governor-General. But as respects New Brunswick and Nova Scotia by sect. 64 the Provincial Constitutions were continued. In other words, whatever powers might have been exercised by any Governor fell to the Governor-General of the Dominion *if the subject matter related to the Dominion of Canada* and fell to the Lieutenant-Governor if the matter related to the Province.

If it had not been for the expression to be found in some judicial utterances placing within very narrow limits the powers of the executive of the Provinces, I should have thought it too clear for argument, that the powers formerly exercised by the Lieutenant-Governors of the other Provinces, and by the Governor-General of Canada in reference to Provincial matters, including agreements or so-called Treaties with the Indians for the extinguishment of their rights, and granting to them in lieu thereof certain reserves either for occupation or for sale, were now vested, exclusively in the Lieutenant-Governors. The view that has been sometimes expressed that they do not represent Her Majesty for any purpose, appears to me to be founded on a fallacy, and to be taking altogether too narrow a view of an Act, which is not to be construed like an ordinary Act of Parliament, but as pointed out in *Hodge v. The Queen* (1), is to be interpreted in a broad, liberal and quasi political sense.

[166] It is obvious that as the public lands are vested in the Queen the Lieutenant-Governor must have the power in Her Majesty's name to grant the same or they cannot be granted at all for the Governor-General clearly has no such power, and it has always been assumed without any express provision in the statutes for making such grants in Her Majesty's name, that the power is vested in the Lieutenant-Governor. There are several clauses of the B. N. A. Act in which his power to act in the name of the Queen is expressly recognized, as for instance; section 82 which empowers him in the Queen's name to summon the legislature, in sect. 72 the Lieutenant-Governor of Quebec is authorised to appoint Legislative Councillors in the Queen's name, and the Provincial Legislatures create Her Majesty's Courts of Civil and Criminal Jurisdiction, the writs in which are issued in Her Majesty's name. And this view appears to have received the direct confirmation of the Privy Council in *Theberge v. Landry* (2) in which the Judicial

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(1) 9 App. Cas. 117; *ante* vol. 3,
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(2) 2 App. Cas. 108; *ante* vol.
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Committee refer to an Act of the Provincial Legislature as having been assented to on the part of the Crown, and to which therefore the Crown was a party. If then it is within the competency of the Legislature of Ontario to legislate for the management and sale of these lands as being public lands belonging to the Province, it would follow that they have the minor power of empowering the Executive to make any agreement for the extinguishment of the so-called Indian right. And I am of opinion therefore that there is no force in the learned counsel's objection that the Governor-General could alone as the representative of Her Majesty accept a surrender of that right from the Indians.

Another reason for assuming that the Provincial authorities are the proper parties to deal with it arises from the consideration that in the event of the tribes ceasing to exist the lands which have been reserved to them, to use Sir John Robinson's language, "for occupation at the pleasure of the Crown" would revert to the Province. Although when once reserved the Dominion Parliament [167] has alone power to deal with their management, it could scarcely have been in the contemplation of Parliament that the Dominion should prescribe to the Provinces the extent or nature of the Reserves.

The Dominion authorities assumed to make the treaty in question under the mistaken belief that the lands were beyond the confines of the Province and were consequently Dominion lands, which will account for the reservation of the right to the Indians still to occupy the vast tract outside their actual reserve for hunting and fishing until granted to settlers by the Dominion Government; which if the treaty is to be adopted in its integrity, would mean for all time to come, as the Dominion Government have no power to make such grants. Even if I did not think the language of the B. N. A. Act which I have quoted clearly conferred upon the Provincial authorities the power to extinguish the Indian title, the same reasoning which compelled us to hold in *Leprohon v. Ottawa* (1), that the Local Legislature had no power to tax the official income of a Dominion officer for provincial or municipal purposes, would compel us in my opinion to hold that the local Governments alone must be the judges of the extent to which lands belonging to them shall be set apart for the use or benefit of any tribe of Indians. If the Dominion Government have the power, being in its nature unlimited, it might as was pointed out in that case be so used as to defeat the Provincial power and control over these lands altogether.

(1) 2 App. Rep. 522; ante vol. 1, p. 592.

In the view which I take of the whole case it was not necessary to consider the question I have lastly discussed, but I thought it due to Mr. McCarthy to let him see that his argument was not overlooked, and I also desired to record my dissent from the view expressed by the Chief Justice upon this part of the case. If however the lands were public lands which passed or remained with the Province, subject to the rights which the Indians might possess, as in my opinion they were, it is clear that the claim of the Dominion to authorize the cutting of the timber cannot be [168] sustained, and the judgment appealed from should consequently be affirmed.

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PATTERSON, J. A. :—

The discussion of this appeal has ranged over a rather wide field, and we have had the benefit of much learning and historical research, for which we are indebted to the industry of counsel on both sides; but I have not been convinced that the learned Chancellor erred in his construction of the provisions of the B. N. A. Act, on which the question of property has to be decided. Two leading propositions were insisted on for the appellants, as Mr. McCarthy reminded us in his reply. First: That the lands in question are not lands in the sense intended in sect. 109, or public property of the kind mentioned in sect. 108, but are of the nature of private property; and secondly, that if this should be otherwise decided, they still passed to the Dominion as "lands reserved for the Indians," described in article 24, of sect. 91. The contest has turned to a great extent upon the second proposition, the effort on the part of the appellants being to establish that lands which had not been the subject of a treaty with the Indians but over which they had always been allowed to hunt and fish without molestation were "lands reserved for the Indians" within the meaning of sect. 91; while it is insisted for the Crown that that phrase is employed to denote a class of lands well known as Indian Reserves, and being tracts of land set apart by treaties for the use of certain tribes or bands, and reserved from the ordinary course of settlement; but it can scarcely be said that each proposition was discussed by itself, and there is no good reason for attempting to consider them separately, even if it were practicable to do so.

I shall not attempt to follow the course of the arguments to which we have listened, or to deal with the historical evidence touching the recognition or disregard by European powers of the rights of the natives of the countries they discovered or conquered

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or seized on this continent to which counsel on both sides appealed [169] in aid of the views they advocated. I have not failed to consider it attentively, and I am satisfied that to discuss it at any length would be only to traverse the same ground which has been gone over by the learned Chancellor in his very able and perspicuous judgment, without adding anything of importance to what he has said.

The general result of the historical evidence is I think as correctly and as concisely stated in Story's Commentaries on the Constitution of the United States as in any other work. I quote from section 6, of the author's abridged edition of 1838. "It may be asked, what was the effect of this principle of discovery in respect to the rights of the natives themselves. In the view of the Europeans it created a peculiar relation between themselves and the aboriginal inhabitants. The latter were admitted to possess a right of occupancy or use in the soil, which was subordinate to the ultimate dominion of the discoverers. They were admitted to be the rightful occupants of the soil, with a legal, as well as a just claim to retain possession of it, and to use it according to their own discretion. In a certain sense they were permitted to exercise rights of sovereignty over it. They might sell or transfer it to the sovereign who discovered it ; but they were denied authority to dispose of it to any other persons ; and until such a sale or transfer, they were generally permitted to occupy it as sovereigns de facto. But notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil while yet in the possession of the natives, subject however to their right of occupancy, and the title so granted was universally admitted to convey a sufficient title in the soil to the grantees in perfect dominion, or, as it is sometimes expressed in treatises of public law, it was a transfer of plenum et utile dominium." This view is evidently that of the Parliament of Canada as may be gathered from the Indian Act, 1880, where "Reserve" is defined as "any tract or tracts of [170] land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered."

I start therefore with the proposition that the title to all these Indian Lands, even before what is called the surrender by the Indians, is in the Crown without attempting by any argument of my own to prove its correctness ; and shall content myself with making a few observations, chiefly concerning the effect of the B. N. A. Act as it strikes me.

The B. N. A. Act when it established the Dominion of Canada by the union of the four provinces of Ontario, Quebec, Nova Scotia and New Brunswick, had to provide for two great subjects, viz., the constitution, including the legislative powers, of each Province, and of the Dominion, and the ownership of the public assets or property of every kind, besides other subsidiary matters.

The division of the Act numbered VIII. and including sects. 102 to 126, is headed "Revenues, Debts, Assets, Taxation."

Section 108 declares that the public works and property of each Province enumerated in the third schedule to the Act shall be the property of Canada. From reading this schedule along with sect. 91, it is evident that in the scheme of the Act, the vesting of property in the Dominion as against the Provinces was not intended to follow or to be inferred merely from the bestowal of exclusive legislative jurisdiction over the subjects with which the property was connected. Thus while exclusive legislative power is given over : (5) Postal Service ; (7) Militia, Military and Naval Service and defence ; (9) Beacons, Buoys, Lighthouses and Sable Island ; (10) Navigation and Shipping ; the schedule expressly enumerates Post offices, Ordnance property, Armouries, Drill-sheds, etc. ; Lighthouses, Piers and Sable Island ; Harbours, River and Lake improvements, etc., etc. There is, however, nothing answering in the schedule to the "lands reserved for the Indians" over which by article 24 of sect. 91, the parliament has exclusive legislative jurisdiction.

[171] Therefore to argue that lands reserved for Indians become, by force of the B. N. A. Act, the property of the Dominion as against the Provinces in which the reserves are situated, is in my judgment to attribute to sect. 91 an effect not contemplated or intended by the framers of the Act, and certainly not the necessary result of the language of the section. The question of the ultimate ownership as between the Dominion and the Provinces, of the ordinary Indian Reservation may not be too speculative a question for discussion. It would become a practical question in the event of any such land ceasing to be required for the occupation of the tribe, or for application by way of sale or lease for its benefit, and falling in, as it were, for ordinary public uses ; and it might become a practical question if it were attempted to dispose of the land or the timber on it for other uses than the benefit of the Indians. It does

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not at present appear to arise except on the assumption that the lands reserved for Indians mentioned in sect. 91, include not only tracts within the definition of "Reserve" in the Indian Act, 1880, but also such lands as those which are the subject of this litigation.

It does not strike me as being involved in the circumstances that the administration of the Reserves belongs to the Dominion Government. The administrative and the legislative functions, I take to be made co-extensive by the Act, as indicated by, inter alia, sect. 130. Nor is the fact that, as part of the administration of Indian affairs, the Dominion Government has made sales or carried out, by granting patents, sales already made, for the benefit of the Indians, of portions of the Reserves inconsistent with the ultimate ownership of the lands by the Provinces. The title is in the Crown, and the patent, whether issued by the Government of the Dominion or by that of a Province, is a grant from the Crown. If the lands should cease to be held for an Indian tribe or band, by reason of the tribe or band ceasing to exist or for any other reason, the question between the Dominion and the Provinces may have to be decided.

[172] I am strongly inclined to the opinion that the lands reserved for Indians mentioned in sect. 91, whatever that term includes, are not vested in the Dominion for any purpose except legislation and administration on behalf of the Indians; but I do not discuss that question more fully because I hold, with the learned Chancellor, that the lands with which we are concerned are not touched by the section.

The title of the Province to the lands in question is in my opinion established by the direct force of sects. 109 and 117. By sect. 109 all lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick, at the Union, were to belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, in which the same were situate or should arise, subject to any trust existing in respect thereof, and to any interest other than that of the Province in the same; and sect. 117 declares that the several Provinces shall retain all their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications, or for the defence of the country.

To take the lands in question out of the operation of the extremely comprehensive effect of these sections, it is essential to establish one of two things: either that by some other provision of the Act they were assigned to the Dominion, or that they were private property of the Indians. The only other provision of the Act on which an argument can be based is sect. 91. I have made all the remarks I think necessary with regard to it.

The contention that the lands belonged to the Indians in any sense which deprived them of the character of lands belonging to the Province, or public property of the Province, is answered by the extract I have read from Story on the Constitution, and by the judgment of the learned Chancellor to which, as I have said, I do not propose to add anything on this point.

[173] The action of the Dominion Government in procuring the extinguishment of the Indian title does not, in my view, in any way affect the legal question which is before us. The defendants assert a right to cut timber on the lands by virtue of a license from the Dominion Government, which is not pretended to have been given in the course of the administration of Indian affairs, or in dealing with lands reserved for Indians, but was admittedly given as a means of producing revenue for the general purposes of the Government. If the lands were, as I hold they were, assigned to the Province, subject to whatever rights the Indians had in them, the Province must have the right to interfere to prevent the spoliation of the lands, whether the Indians retain or have surrendered their title.

Other matters connected with the surrender of the Indian title were referred to at the bar, and from reading the treaty of the north-west angle and the history of the negotiations in the volume published by the Hon. Mr. Morris, we see that certain outlay was incurred and certain burdens assumed by the Government. Of these things I can say no more than that they seem to me to leave the legal question untouched. Whether they give rise to any claims or equities between the Dominion and the Province is a matter of policy as to which we have no information, and with which we are not concerned beyond the one question of the effect on the right to the timber.

I agree that we must dismiss the appeal.

OSLER, J. A. :—

I am satisfied to affirm the learned Chancellor's judgment for the reasons stated therein, and in the judgment of the learned Chief Justice which I have had an opportunity of reading.

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JUDGMENT OF BOYD, C. (*before whom the case came in the first instance.*)

[*Reported 10 Ontario Reports 196.*]

BOYD, C. :—

The Province of Ontario seeks the intervention of the Court, in order that the St. Catharines Milling and Lumber Company may be restrained from trespassing and cutting timber on lands claimed by the Province.

The defendants justify under license obtained from the Government of Canada in April, 1883, by virtue of which they assert the right to cut over timber limits on the south side of Wabigoon (or Wabegon) Lake, in that portion of Canada situated between Lake Superior and Eagle Lake. The defendants further plead specially [204] that the place in question forms part of a district till recently claimed by tribes of Indians who inhabited that part of the Dominion, and that such claims have always been recognised by the various Governments of Canada and Ontario, and by the Crown: that such Indian claims were paramount to the claim of the Province of Ontario, and that the Dominion have by purchase acquired the said Indian title, and by reason thereof, as well as by inherent right, the Dominion and not the Province is alone entitled to deal with the said timber limits.

It is admitted that these timber lands are within the territorial limits of Ontario as determined by the recent decision of the Privy Council. (1) That decision finally ascertained the boundaries assigned to the old Province of Quebec, by the Imperial statute 14 Geo. III., c. 83, commonly called "The Quebec Act." (2) By that Act passed in 1774, it was intended to provide for the permanent government of the newly acquired domain, and to supersede the provisional system introduced by the Royal proclamation of 1763. By the 4th article of the Treaty of Paris (10th February, 1763) France ceded Canada with all its dependencies to the Crown of Great Britain. In October of the same year the King's Proclamation erected within part of the ceded territories the new Government of Quebec, the western extension of which was placed at the end of Lake Nipissing. It was speedily found that this boundary excluded a large extent of settled country which was left without Civil Government, as appears by the preamble to the Quebec Act, and this was cured by fixing the interior boundaries on the lines now established as the western limit of Ontario.

(1) *Ante* p. 129.

(2) *Ante* vol. 3, p. 445.

The legal and constitutional effect of the conquest of Quebec and the cession of Canada was to vest the soil and ownership of the public land in the Crown, and to subject the same to the Royal Prerogative. The French and Indian populations that remained in the country became by the terms of capitulation the subjects of the King. So far as the latter were concerned it was stipulated in the articles of capitulation concluded at Montreal (on Sept. 8th, [205] 1760) between Major-General Amherst and the Marquis de Vaudrenil as follows : "Article XL.—The Savages or Indian allies of His Most Christian Majesty shall be maintained in the lands they inhabit if they choose to remain there ; they shall not be molested on any pretence whatsoever, for having carried arms and served His Most Christian Majesty ; they shall have as well as the French liberty of religion and shall keep their missionaries. *Granted.*"

In 1791 the old Province of Quebec was divided into Upper Canada and Lower Canada, by Imperial Statute 81 George III., c. 31, (1) which while enlarging the rights of self-government made provision in section 43 for the reservation of all Acts "which shall in any manner relate to or affect the King's prerogative touching the granting the waste lands of the Crown within the said Provinces," in order that they might be submitted to the British Parliament before receiving the King's assent. The custody, control and ownership of all public lands in Upper Canada was transferred to the Provincial Government in 1837, by the Act 7 Will. IV., cap. 118, to which, after being duly reserved, the royal assent was given. In 1840 the Imperial Parliament re-united the Provinces of Upper and Lower Canada as one Province by the name of Canada, (See 3 & 4 Vict. cap. 35) (2) a union which subsisted till superseded by the larger union accomplished by the B.N.A. Act. There being a like reservation as to waste land in sect. 42 of the Union Act, it was by statute 4 & 5 Vict. c. 100 of Canada declared that it was expedient to provide a law applicable to all parts of the Province, for the disposal of public lands therein. Such a law was embodied in this enactment which received Her Majesty's assent on the 30th May, 1842. The comprehensiveness of this Act is manifested by 12 Vict. cap. 31, which applies it to all lands of which the legal estate is in the Crown whether held by her Majesty for the public uses of the Province, or in the nature of a trust for some charitable or other purpose (secta. 1 and 2). Sect. 4 shows that it covers "lands purchased [206] from the Indians," e.g. the "Huron tract." By another Act of the same year (12 Vict. cap. 80) provision is made for granting

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(1) *Ante* vol. 3, p. 458.

(2) *Ante* vol. 3, p. 481.

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licenses to cut timber on the ungranted lands of the Province elsewhere therein referred to as growing on the "public lands of the Province," and by sect. 7 these are enumerated as "Crown, clergy, school or other public lands of the Province." This is consolidated in the Consolidated Statutes of Canada, cap. 23.

Such is a brief sketch of the history of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to provincial legislative control.

The colonial policy of Great Britain, as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered widecast over the continent, having as a characteristic no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians, it was not thought that they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated "Justly and graciously" as Lord Bacon advised, but no legal ownership of the land was ever attributed to them. The Attorney General in his argument, called my attention to a joint opinion given by a "multitude of counselors" about 1675, touching land in New York, while yet a Province [207] under English rule. (1) I think it accurately states the constitutional law in these words :

"Though it hath been and still is the usual practice of all pro-

(1) The opinion referred to was as follows :

Councils opinions concerning Col. Nicholls patent and Indian purchases.

The land called N. York and other parts in America now called N. East Jersey was first discovered by Sebastian Cobbitt a subject of England in King Henry ye 7th time, about 180 years since & afterwards further by Sr. Walter Raleigh in ye Reign of Queen Eliz. and after him by Henery Hudson in ye Reign of King James and also by the Lord Delaware and begun to be planted in ye year 1614 by Dutch and English ; the Dutch placed a Governor there, but upon complaint made by the King of England to ye States of Holland the sd. States Disown'd

ye Business & Declared it was only a private undertaking of ye West India Company of Amsterdam, so ye King of England granted a Comison to Sr. Edward Layden, to plant these parts calling them New Albion, & ye Dutch Submitted themselves to ye English Govermt., but in King Charles ye 1st Reign ye troubles in England breaking forth the English not minding to promote these new plantations because of ye troubles, ye Dutch pretended to Establish a Gover't there again untill ye year 1660, when afterwards it was reduced under ye English Govermt & included and ratified in ye peace made between England and Holland, then it was granted to ye Duke of York 1664, who ye same year granted it to ye

prietors to give their Indians some recompense for their land, and so seem to purchase it of them, yet that is not done for want of sufficient title from the King or Prince who hath the right of discovery, but out of prudence and Christian charity, lest otherwise the Indians might have destroyed the first planters, (who were usually too few to defend themselves,) or refuse all Commerce and [208] Conversation with the planters, and thereby all hopes of converting them to the Christian faith would be lost. In this the Common law of England and the Civil law doth agree. . . . Though some planters have purchased from the Indians, yet having done so without the consent of the proprietors, for the time being, the title is good against the Indians, but not against the proprietors, without a confirmation from them upon the usual terms of other plantations." Vol. xiii "Documents relating to Colonial history of the State of New York" p. 486.

[209] Of the six counsel who sign this opinion, one (Richard Wallop) became Cursitor Baron of the exchequer, another, (Henry Pollexfen) became Chief Justice of the Common Pleas, and a third, (Holt) was afterwards Chief Justice of England.

In a classical judgment, Marshall, C. J., has concisely stated the same law of the mother country, which the United States inherited, and applied with such modifications as were necessitated by the

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Ld. Barckley & Sr. George Cartrett betwixt ye Dukes grant to ye Ld. Barckley & Sr. George Cartrett and notice there of in America. Several persons took Grants of Land from Coll. Nicholls ye Duke's Govenr. Severall of ye planters have purchased of ye Indians, but Refuse to pay any acknowledgment to ye King's Grantees.

Q.—1st. Wither ye Grants made by Coll. Nicholls are good agt. the Assigns of ye Ld. Berckley & Sr. George Cartrett.

Q.—2nd. Wither the grants from ye Indians be sufficient to any planter without a grant from ye King or his Assignes.

Ans.—1st. To ye first Question the authority by which Coll. Nicholls Acted Determined by ye Dukes Grant to ye Ld. Berckley & Sr. George Cartrett, and all grants

made by him afterwards (tho according to ye Comison) are void for ye Delegated power wch Coll. Nicholls had of making Grantes of ye Land could last no longer than his master's Interest who gave him yt power & ye having or not having notice of ye Dukes Grant to ye Lord Berckley & Sr. George Cartrett makes no difference in ye law but ye want of notice makes it great equity yt ye present propritrs Should Confirm Such Grants to ye people who will Submit to the Comissions & payments of the present proprietors Quitt rents other wise they may look upon them as Deseizers & treat them as such.

Answ. To the 2nd Question by ye Law of Nations if any people make Discovery of any Country of Barbarians the prince of yt people who make ye Discovery hath ye

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change of government to their dealings with the Indians. I quote passages from *Johnson v. McIntosh* (1).

“According to the theory of the British constitution all vacant lands are vested in the Crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative. . . . This principle was as fully recognized in America as in the Island of Great Britain. . . . So far as respected the authority of the Crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy

Right of ye Soyle & Govermt of yt place & no people can plant there without ye Consent of ye Prince or of such persons to whom his right is Devoulved & Conveyed the Practice of all Plantations has been according to this & no people have been Suffered to take up Land but by ye Consent and Lycence of ye Govr. or preproietors under ye princes title whose people made ye First Discovery & upon their Submition to ye laws of ye Place & Contribution to ye Publick Charge of the place & ye payment of Such Rent & other Value for ye Soile as ye Proprietrs for ye time being Require, and tho it hath been & Still is ye Usuall Practice of all Proprietrs to give their Indians Some Recompence for their land & so seem to Purchase it of them yet yt is not done for want of Sufficent title from ye King or Prince who hath ye Right of Discovery but out of Prudence & Christian Charity Least otherwise the Indians might have destroyed ye first planters (who are usually too few to defend themselves) or Refuse all Commerce and Conversation with ye planters &

thereby all hopes of Converting them to ye Christian faith would be Lost. In this the Common Law of England and ye Civill Law doth agree and if any Planter be Refractory & will insist on his Indian Purchase and not Submit to this Law of Plantations ye Propriets who have ye title Under ye Prince may deny them ye benefit of ye Law & Prohibitt Commerce with them as Opposers and Enemys to ye Public peace. Besides tis observable yt no man can goe from England to plant in an English Plantation without leave from ye Govermt & therefore in all Patents & grants of Plantations from ye King a Particular Lycence to Carry Over Planters is incerted wch Power in Prohibiting is now in ye Propriets As ye Kings Assigns and therefore tho some Planters have purchased from ye Indians yett having done soe without ye Consent of ye Propriets for ye time being ye Title is good against the Indians but not against the Propriets without a Confirmation from them upon the usuall terms of Other Plantations.

A true Coppy
GARVIN LAWRIE.
ROBT. WEST.

WM. LECK.
WM. WILLIAMS.
JO. HOLLES.
JOHN HOYLE.

JO. HOLT.
WM. THOMSON.
RICH'D WALLOP.
HEN. POLLEXFEN.

by the Indians, was admitted to be in the King, as was his right to grant that title." At p. 588: "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right."

This right of occupancy attached to the Indians in their tribal character. They were incapacitated from transferring it to any stranger, though it was susceptible of being extinguished. The exclusive power to procure its extinguishment was vested in the Crown—a power which as a rule was exercised only on just and equitable terms. If this title was sought to be acquired by others than the Crown, the attempted transfer passed nothing, and could operate only as an extinguishment of the Indian right for the benefit of the title paramount. See judgment of Burns, J., in *Doe d. Sheldon v. Ramsay* (1).

Many parliamentary recognitions of these principles might be [210] cited, but let one or two suffice. There is to be found an affirmance of the established doctrine that the ungranted and waste lands of the country are vested in the Crown for the public, subject to the Indian title, which is capable of being dealt with by way of extinguishment only, and not by way of transfer, in the Dominion Statute 33 Vict. c. 3, sects. 30, 31 and 32. There is also a very emphatic declaration of the customary Indian lands policy to be found in the address to Her Majesty from the Senate and House of Commons of Canada, in December, 1867, praying for the extension of the Dominion to the shores of the Pacific, in which it is represented, that upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement, will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines. Following this up the same legislative bodies in May, 1869, resolved that upon the transference above mentioned, "it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer." This being embodied in the address subsequently presented to the Queen, the transfer was consummated by Imperial Order in Council of June 23rd, 1870, article 14 of which stipulated that "any claims of Indians to compensation for lands required for purposes of settlement, shall be disposed of by the Canadian Government, in communication with the Imperial Government." 35 Vict. (D.) p. lxvii.

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At the time of this conquest the Indian population of Lower Canada was as a body Christianized and in possession of villages and settlements known as the "Indian Country." By the terms of capitulation they were guaranteed the enjoyment of these territorial rights in such lands which in course of time became distinctively and technically called "reserves." By a Quebec Ordinance of Guy Carleton of 1777 (17 Geo. III., c. 7, s. 3), it was declared unlawful [211] for any person to settle in the Indian country within that province without a written license from the Governor, and no person was allowed to trade without license in any part of the province upon lands not granted by His Majesty.

But in Upper Canada the native tribes were in an untaught and uncivilized condition, and it became necessary to work out a scheme of settlement which would promote immigration, and protect both red and white subjects, so that their contact in the interior might not become collision. A *modus vivendi* had to be adjusted. The course of civilized colonization in the North-West at this day presents in its essential features a counterpart of what was going on in the now thickly populated parts of Upper Canada at the beginning of this century. And the manner of dealing with the rude red men of the North-West, in the way of negotiating treaties for the surrender of their lands, and conciliating them in the presence of an ever-advancing tide of European and Canadian civilization, is but a reproduction or rather a continuation and an expansion of the system which had commended itself as the most efficient in old Canada. The inevitable problem, in view of the necessary territorial constriction of the Indian occupants of those vast expanses over which they and their forefathers have fished and hunted and trapped from time immemorial, was, and is this: how best to subserve the welfare of the whole community and the state, how best to protect and encourage the individual settler, and how best to train and restrain the Indian, so that being delivered by degrees from dependency and pupilage he may be deemed worthy to possess all the rights and immunities and responsibilities of complete citizenship. These three considerations mainly, have shaped the policy of the government in the past as in the present. For an admirable résumé of what has been done in the earlier history of Canada, I will avail myself of some passages to be found in a joint report of Messrs. Rawson, Davidson and Hepburn, on Indian affairs, prepared in 1844, and printed among the journals of the Legislative Council [212] of Canada, vol. 4, as appendix E E E, of the session 1844-5, and the journals of the Legislative Assembly of Canada, appendix to vol. 6 as appendix T, of the session of 1847. I may at this point also

mention how greatly I have been indebted to another joint report of Vice-Chancellor Jameson, Mr. Justice Macaulay, and this same Mr. Hepburn, of 1840, which is printed as a supplement to the later report of 1844 : Journals of the Legislative Assembly of Canada, appendix to vol. 6, appendix No. 1 to appendix T. These two papers form a compendium of valuable knowledge and research not readily accessible elsewhere.

"Since 1763 the government, adhering to the Royal Proclamation of that year, have not considered themselves entitled to dispossess the Indians of their lands without entering into an agreement with them and rendering them some compensation. For a considerable time after the conquest of Canada the whole of the western part of the Upper Province, with the exception of a few military posts on the frontier, and a great extent of the eastern part were in their occupation. As the settlement of the country advanced, and the land was required for new occupants, or the predatory and revengeful habits of the Indians rendered their removal desirable, the British Government made successive agreements with them for the surrender of portions of their lands. . . . If the government had not made arrangements for the voluntary surrender of their lands, the white settlers would gradually have taken possession of them without offering any compensation whatever. It would at that time have been as impossible to resist the natural laws of society, and to guard the Indian territory against encroachment of the whites, as it would have been impolitic to have attempted to check the tide of immigration. The government therefore adopted the most humane and most just course in inducing the Indians by offers of compensation, to remove quietly to more distant hunting grounds, or to confine themselves within more limited reserves, instead of leaving them and the white settlers exposed to the horrors of a protracted struggle for ownership. . . . In every case the Indians had either the opportunity of retreating to more distant hunting grounds, or they were left on part of their wild possessions with a reserve, supposed at the time to be adequate to all their wants and greatly exceeding their requirements as cultivators of the soil at the present day, to which were added the range of their old haunts until they became actually occupied by settlers, and in many cases an annuity to themselves and their descendants forever, which was equivalent at least to any benefit they derived from the possession of the lands : " Journals of the Legislative Council of Canada, vol. 4, appendix E E E.

"In Upper Canada, where at the time of the conquest the Indians were the chief occupants of the territory, where they were

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[213] all pagans and uncivilized, it became necessary as the settle-
 ment of the country advanced to make successive agreements with
 them for the peaceable surrender of portions of their hunting
 grounds. The terms were sometimes for a certain quantity of
 presents once delivered, or for an annual payment in per-
 petuity. . . . These agreements . . . sometimes contain reser-
 vations of a part of the land surrendered for the future occupation
 of the tribe. In other cases separate agreements for such reserva-
 tions have been made, or the reservations have been established by
 their being omitted from the surrender, and in those instances
 consequently, the Indians hold upon their original title of occu-
 pancy:" Journals of the Legislative Assembly of Canada, appendix
 to vol. 6, appendix T.

I may just notice in passing, that this last clause is not expressed
 with sufficient fulness or precision : where the reserve is omitted
 from the surrender, the title (so-called) by occupancy to that no
 doubt continues ; but coupled with the exclusive and legally
 recognized rights thereto, which attach to a reserve. Some of these
 rights, the report proceeds to point out, in these words :

" Among the consequences of the peculiar title under which the
 Indians hold their lands, are their exclusion from the political
 franchise, and their immunity from statutory labor, the exemption
 of their lands from taxation, from seizure for debt, and the
 exclusion of the white settlers from their reserves." *Ib.* The
 reserves were held and occupied in common by the tribe as general
 property, but any member or family, by arrangement with the
 chief, could mark off and cultivate a particular plot. These Indian
 lands could not be alienated or dealt with in the way of transfer,
 except by being surrendered to the Crown. This was frequently
 done for the purpose of having parts they did not desire to retain
 sold for the benefit of the tribes concerned. Such reserves and the
 proceeds of such reserves when surrendered and sold were held by
 the Crown as a Royal Trustee for the Indians : *Bastien v. Hoff-*
man (1).

On this footing then have been negotiated all the treaties
 between commissioners for the government and the respective
 tribes or nations of Indians found existing upon the different tracts
 covered by the treaties. As characteristic of all, the particular

(1) 17 L. C. R. 238, Drummond, J.

[214] treaty which embraces the land now in dispute may be epitomized. It is called the "North-West Angle Treaty No. 3" (see Sessional Papers of the Dominion, 1875, vol. 8, No. 7, paper No. 8 at p. 19), from having been entered into at a meeting convened at the north-west angle of the Lake-of-the-Woods (which is a notable point on the International Boundary between Canada and the States), and because of the series of treaties affecting lands between the great lakes and the Rocky Mountains, made since confederation, it is third in chronological order. It purports to be between Her Most Gracious Majesty, by her commissioners, the Hon. Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-West Territories, Joseph Albert Norbert Provencher, and Simon James Dawson, of the one part, and the Saulteaux tribe of the Ojibbeway Indians inhabiting the country defined in the body of the treaty, by their chiefs, of the other part.

It recites that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes as to her may seem meet, the tract of country described, and to obtain the consent thereto of her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them so that there may be peace and good-will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

By the operative part the Saulteaux tribe do thereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty, etc., all their rights, titles and privileges whatsoever to the lands included in the limits therein described.

The Queen then agrees and undertakes to lay aside reserves for farming lands (due respect being had to lands then cultivated by the Indians), and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by the Government of the Dominion, other reserves of land in the ceded territory, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous [215] for each band or bands of Indians, by the officers of the Government, after conference had with the Indians: Provided that such reserve, whether for farming or other purposes, shall not exceed in all one square mile for each family of five, or in that pro-

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portion for larger or smaller families, it being understood, however, that if there were any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to Indians; and provided, also, that the said reserves of lands, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said government for the use and benefit of the said Indians, with their consent first had and obtained.

Her Majesty then agrees to maintain schools for instruction on the reserves when desired by the Indians.

Next is a prohibition of the sale of intoxicating liquors within the boundary of the reserves.

The Queen then agrees that the Indians shall have the right to pursue their avocations of hunting and fishing throughout the tract so surrendered, saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering, or other purposes by the Government of the Dominion, or by any of her subjects duly authorized therefor by the said government.

If any portion of the reserves is required for public works, due compensation is to be made therefor.

Provision is then made for the taking of a census of the Indians inhabiting the tract, and an agreement to pay to each Indian the sum of \$5 per head yearly.

Then follow further agreements that \$1,500 yearly shall be expended by the Queen for the purchase of twine and nets for the Indians, and for the supply of tools and agricultural implements, cattle and seed, etc., etc., the particulars of which need not now be given.

The liberal treatment of the Indians, and the solicitude for their well-being, everywhere manifested throughout this treaty, are the [216] outgrowth of that benevolent policy, which before confederation attained its highest excellence in Upper Canada. In Nova Scotia and New Brunswick, the Micmacs and other tribes appear to have been comparatively neglected, so that we find that the Hon. Joseph Howe (a competent witness), in submitting the report for Indian affairs in 1873 (Sessional Papers of the Dominion, 1873, vol 6, No. 5, paper No. 23), when referring to the manner of dealing with the

Indians in the maritime provinces, gives a decided preference to the system pursued in Ontario and Quebec, and proceeds enthusiastically to declare that "the crowning glory of Canadian policy in all times, and under all administrations, has been the treatment of Indians." In the report of the Hon. D. Laird for 1876 (Sessional Papers of the Dominion, 1876, vol. 9, No. 7, paper No. 9), he thus adverts to this point. "In some of the provinces the Indian policy may have been partially shaped before they came under the British Crown; but as there was sufficient opportunity after the cession to have adopted a more liberal policy, it is not very apparent why the Indians were more liberally treated in Upper Canada than in any of the other old Provinces. It is a matter for gratulation that a policy as liberal as that adopted in Ontario, is being pursued in the North-West territories, and that the Indians there, provided they turn to the cultivation of their extensive reserves, or the raising of stock, may become prosperous and contented."

I have adverted to this aspect of the matter in order to show that the characteristic Canadian policy upon Indian questions, both before and after confederation, is to be sought and studied in the records of Upper Canadian affairs, and this affords assistance, (if assistance on this head be required) in order to the construction and interpretation of the provisions of the B. N. A. Act applicable to the present controversy.

In 1801, an Act was passed in Upper Canada, 41 Geo. III, c. 8, making it unlawful to sell liquors to Moravian Indians, inhabiting a tract of land on each side of the River Thames. In 1829, the Upper [217] Canada Act, 10 Geo. IV. c. 8, recited the sale and surrender by the Mississauga Indians to His Majesty, of large tracts of land, reserving for themselves and their posterity, a certain parcel on the River Credit, containing 4,000 acres, and restrained anyone from hunting or fishing thereon, without the consent of the Indians. By sect. 2, it was declared that nothing therein contained should diminish their common law rights of having their lands protected from trespass or waste, in the same manner as other subjects of His Majesty. In 1839, an Act was introduced by Hagerman, A. G. (2 Vict. c. 15), which contained this recital, "whereas the lands appropriated for the residence of certain Indian tribes in this Province as well as the unsurveyed lands and lands of the Crown ungranted" and not under location, have been trespassed upon from

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time to time. It then directed the appointment of commissioners to inquire into complaints against any person who illegally possesses himself of any of the aforesaid lands "for the cession of which to Her Majesty no agreement hath been made with the tribes occupying the same, and who may claim title thereto." This statute is referred to in the report of 1840 (1) (the joint production of Vice-Chancellor Jameson, Mr. Justice Macaulay, and Mr. Robert Hepburn) as "An Act for the protection of the Indian reserves." I have not noticed an earlier employment of this term in the public Acts and documents of Upper Canada, though it must have been long in colloquial use. As thus used, "reserves" meant lands appropriated for the residence of Indian tribes, for the cession of which to the Crown no agreement had been made with the Indians who occupied the same.

This statute was amended so as to be of more comprehensive scope in pursuance of a suggestion to that effect in the subsequent report by Messrs. Rawson, Davidson and Hepburn already mentioned. (2) The amending statute is 12 Vict. cap. 9, (1849) and extends the Act of 1839 to all lands in that part of the Province called Upper Canada, whether such lands be surveyed or unsurveyed, for which no grant, etc., has issued from the proper department of the Provincial Government, "and whether such land be part of those usually known as Crown reserves, clergy reserves, school lands, or Indian lands, or by or under any other denomination whatsoever, and whether the same be held in trust, or in the nature of a trust for the use of the Indians, or of any other parties whomsoever." (These two Acts were consolidated in C. S. U. C. cap. 81.)

At this time Upper and Lower Canada had been re-united, and the control of the public and waste lands of the Crown had passed to the Provincial Government. The Act of 12 Vict. read in connection with the report on which it was based, shews that the expression "Indian lands" is used as synonymous with "Indian reserves," and that the Act was intended to deal with and protect such "reserves" whether held by the tribes, or by them surrendered to the Crown, for sale or other purposes.

A further outcome of the elaborate report published in 1847, was an Act "for the protection of Indians in Upper Canada, from im-

(1) Printed as appendix 1 to appendix T, in appendix to vol. 6 of the Journals of the Legislative Assembly of Canada.

(2) Printed in part as Appendix

E.E.E. in Journals of Legislative Council of Canada, vol. 4: and in part as Appendix T. in appendix to vol. 6 of the Journals of the Legislative Assembly of Canada.

position, and the property occupied or enjoyed by them from trespass and injury :” 13 and 14 Vict. cap. 74, (1850). In that report the term “Indian lands” is uniformly employed to signify tracts of land appropriated for the exclusive use of the Indians, and is used interchangeably with the the term “Indian reserves.” Such is its meaning throughout this Act. By sect. 1, any purchase or contract for the sale of lands made with the Indians, or any of them, is not valid without the consent of the Crown. By sect. 4, no taxes are to be assessed upon Indian lands, nor upon any Indian, so long as he resides on “Indian lands not ceded to the Crown, or which having been so ceded, may have been again set apart by the Crown for the occupation of Indians.” By sect. 10, for the purpose of affording better protection to the Indians in the unmolested possession and enjoyment of their lands, it is enacted, that none but Indians shall settle, reside upon, or occupy any lands belonging to, or occupied by any portion or tribe of Indians within Upper Canada.

Sect. 1 of this Act was no doubt suggested by a case of *Bown v. West*, (1) which came before Jameson, V. C. in 1845. That was a bill to rescind a contract for the sale of Indian lands. The Court dismissed the bill, because among other reasons, the whole title, legal and equitable, was in the Crown. This decision was affirmed in appeal, the judgment of the Court being pronounced by Robinson C. J., (2). The Vice-Chancellor stated that the bill presented this state of facts only ; that one party sells and the other purchases the right to the possession of Indian, that is of Crown lands, such right of possession never having been out of the Crown, but specially appropriated to the use of the Six Nation Indians. under the proclamation of Governor Haldimand. The nature of this tenure, he says, by the Indians and their incapacity, either collectively or individually, to alienate or confer title to any portion of such lands, might have been sufficiently plain, even though not decided in *Doe ex dem. Jackson v. Wilkes* (3) (E. T. Wm. iv.). The whole tenor of this decision shows that “Indian lands” or “the Indian title” were expressions used in reference to Crown lands which had been specifically set apart and reserved for the exclusive use of the Indians. Such, indeed, is the express language of the Chief Justice in appeal, 1 E. & A., at p. 118.

The term “Indian lands,” with like meaning, is next found in 16 Vict. c. 159, s. 15, (1853,) which refers to that class of lands as

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(1) 1 O. S. 288.

(2) 1 E. & A. 117.

(3) 4 O. S. 142.

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being under the management of the Chief Superintendent of Indian affairs.

The next advance in legislation was by 20 Vict, cap. 26, (1857,) an Act to encourage the gradual civilization of the Indian tribes of Canada, the preamble of which declared, that it was desirable to encourage the progress of civilization among the Indian tribes, and the gradual removal of all legal distinctions between them and Her [220] Majesty's other Canadian subjects, and to facilitate the acquisition of property, and of the rights accompanying it by such individual members of the said tribes as shall be found to desire such encouragement, and to have deserved it. That and the other Acts are consolidated in O. S. Can. c. 9, s. 1 of which defines "Indian" to mean only "Indians or persons of Indian blood or intermarried with Indians, acknowledged as members of Indian tribes or bands residing upon lands which have never been surrendered to the Crown, (or which, having been so surrendered, have been set apart, or are then reserved for the use of any tribe or band of Indians in common,) and who themselves reside upon such land." Sect. 18 of the consolidated Act, borrowing from 20 Vict. c. 26, s. 15, provides that "Indian reserves" may be attached by any municipal council, on application of the Superintendent General of Indian affairs, to a neighbouring school section.

In the Act of 1860, 23 Vict. cap. 2, respecting sale and management of public lands, it is declared by sect. 38 that the term public lands, shall be held to apply to lands theretofore designated as Crown lands, school lands, clergy lands and ordnance lands, and by sect. 9 it is provided, that the Governor in Council may declare the provisions of that Act to apply to "Indian lands," under the management of the Chief Superintendent of Indian affairs. As to all ungranted lands, the title to which is in the Crown, this Act applies the designation Public lands, with the sole exception of Indian lands, which are unique, and subject to the special supervision of an officer who represents the guardianship of the Crown. The Legislature of Canada, in the Statute 27 and 28 Vict. cap. 68 has interpreted "Indian lands" to mean an "Indian reservation." Act 69 of the same session refers to the reserve of the Huron Indians, at Lorette, commonly known as the "Quarante Arpents."

As a deduction from all this legislation I am induced to believe that the expression "Indian reserves," or "lands reserved for [221] Indians," had a well recognized conventional and perhaps technical meaning before and at the date of confederation.

"Lands reserved for the Indians," is used in the B. N. A. Act as a well understood term, and that it was so is further demonstrated

when one looks at the results of previous legislation in the various confederated provinces other than Upper Canada, as to which sufficient has been quoted and said.

Chapter 10 of the Revised Statutes of Prince Edward Island (1856) is an Act relating to the Indians, in which it is declared that it is found necessary and expedient to protect the Indians in the possession of any lands now belonging to them, or which may hereafter be granted or given to them. Sect. 3 provides that commissioners shall take the supervision and management of all lands that may have been, or are now, or may hereafter be set apart as Indian reservations, or for the use of Indians, and shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians.

From the sessional papers I learn that nearly all the reserves in this island have been provided for the Indians by the liberality of private persons, and through the medium of the Aborigines Protection Society, of London.

In the Revised Statutes of Nova Scotia (1851), cap. 28 relates to Crown lands, of which s. 5 reads : "the governor may reserve for the use of the Indians of this province such portions of the lands as may be deemed advisable, and make a free grant thereof for the purposes for which they were reserved." Opposite this the marginal compendium is "Indian reserves and Free Grants." Chapter 58 is entitled "Of Indians," and sect. 3 provides that the commissioners shall take the supervision and management of all lands that are now or may hereafter be set apart as Indian reservations for the use of Indians, they shall ascertain and define their boundaries, and report to the governor all cases of intrusion, or of the transfer or sale of such lands, or of the use or possession thereof by the Indians, and generally shall protect such lands from encroachment and alienation, and shall preserve them for the use of the Indians. Sect. 5 provides for prosecution, by information, in the name of Her Majesty, in case of encroachment, notwithstanding the legal title may not be vested in the Crown.

In the Revised Statutes of New Brunswick (1854), title 13 relates to "Indian reserves." Sect. 1 authorizes surveys of these reserves. Sect. 3 is as to the appointment of commissioners to protect the interests of the Indians. Sect. 7 provides that proceeds of all sales and leases of the reserves shall be applied for the exclu-

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sive benefit of the Indians. Sect. 10 provides for laying off any tract of such reserves into villages or town plots for the exclusive profit of the Indians of that country.

In the Consolidated Statutes of Lower Canada (1861), cap. 14 is headed "An Act respecting Indians and Indian Lands." Sect 3: "No person shall settle in any Indian village or in any Indian country in Lower Canada without a license in writing from the governor," etc. Sect. 7: "The governor may from time to time appoint a commissioner of Indian lands for Lower Canada in whom . . . all lands or property in Lower Canada appropriated for the use of any tribe or body of Indians shall be vested in trust for such tribe or body," etc.

Sect. 7 extends to any lands in Lower Canada held by the Crown in trust for, or for the benefit of any such tribe or body of Indians, but shall not extend to any lands vested in any corporation or community legally established, etc., although held in trust for any such tribe or body.

By sect. 12, tracts of land in Lower Canada, not exceeding in the whole 230,000 acres, may be described, surveyed, and set out by the Commissioner of Crown lands, and such tracts of land shall be respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, as directed by Order in Council.

[223] This provision is taken from 14 and 15 Vict. c. 106. a. 1, and is probably intended to remedy the condition of many tribes whose occupation of lands had been disturbed without compensation being made therefor, and to provide them a means of living in return for what they had thus been deprived of.

Con. Stat. L. C. c. 24, s. 54, is headed "Roads through Indian Reserves," and provides that municipal councils may cause roads to be opened through any part of an Indian reserve, and the compensation therefor shall be paid to the Superintendent General of Indian affairs, for the use of the tribe of Indians for which such land is held in trust.

The legislation of Canada since confederation also reflects very clear light upon what was understood by the Indian reserves. For instance, in 1868 it is declared that "all lands reserved for Indians, . . . or held in trust for their benefit, shall be deemed to be reserved and held for the same pur-

poses as before the passing of this Act, . . . and no such lands shall be sold, alienated or leased until they have been released or surrendered to the Crown, etc." (See sect. 6 of 31 Vict. cap. 42.) By sect. 10: "No release or surrender of any such lands (reserved for the use of the Indians) to any party, other than the Crown, shall be valid." Sect. 15 refers to land appropriated to the use of the Indians, in which the Indians are interested. Sect. 37 provides for protection and management of Indian lands in Canada, whether surrendered for sale, or reserved, or set apart for the Indians. Again, in 1869, 32-33 Vict. cap. 6, provides for the locating of lots to Indians on reserves which have been sub-divided by survey with a view to their ultimate proprietorship and consequent enfranchisement of the owner. And in 1876, 39 Vict. c. 18, s. 3, we find a valuable set of definitions, in which occurs for the first time a differentiation in meaning between the theretofore equivalent terms "Indian reserves" and "Indian lands." See *Totten v. Watson* (1). [224] By that Act "reserve" is declared to mean "any tract or tracts of land set apart by treaty or otherwise for the use or benefit of, or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered and includes all the trees, etc.," whereas "Indian lands" is to mean "any reserve or portion of a reserve which has been surrendered to the Crown." "Special Reserves" includes lands set apart for the Indians, the legal estate to which is outstanding in trustees other than the Crown (as e.g. in Prince Edward Island and Quebec). These definitions are all repeated in the last Statute of 1880, 43 Vict. c. 28 (D.)

The words "lands reserved for the Indians" in the B. N. A. Act have been the subject of judicial consideration, in *Church v. Fenton*, (2) in which the judgment of the Court was delivered by Mr. Justice Gwynne. It is on this account of great value because he was charged with the duty of reporting upon various matters of difficulty and importance in connection with the Indian Department at the time of the Union of the Provinces in 1840. A reference to his name and services frequently appears in the reports of the Commissioners from which I have so largely drawn. To understand some expressions in his judgment it is essential to remember that the land then in dispute formed part of an original Indian Reserve, situate in the Saugeen Peninsula, which had been surrendered in 1854 for the purposes of sale in the usual way, out

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(1) 15 U. C. Q. B., 395. (2) 28 U. C. C. P., 384; *ante* vol. 1, p. 831.

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of which larger reserve surrendered, the Indians retained three smaller reserves for their special occupation. That decision was in 1878, and the learned Judge adopts the definitions given in the Act of 1876, whereby "Indian Lands," were distinguished as well from "Public Lands" as from "Indian Reserves." Referring to the 24th item of the 91st sect. of the Constitutional Act for Canada "Lands reserved for the Indians," he thus proceeds, at p. 399: "That is an expression appropriate to the unsundered lands [225] reserved for the use of the Indians described in different Acts of Parliament as 'Indian Reserves,' and not to lands in which, as here, the Indian title has been wholly extinguished." *Church v. Fenton* was affirmed in appeal, (1) and by the Supreme Court, (2), though not on this precise point. If "lands reserved for Indians" and "Indian Reserves" are of co-extensive import, it is plain that the territory now in dispute cannot be called "land reserved for Indians."

But it is argued for the defendants that the key to unlock the meaning of the Act of 1867 must be sought in the Royal Proclamation of 1763, (3).

The scope and object of that instrument, therefore, require to be considered. The primary intent of the proclamation was to provide temporarily for the orderly conduct of affairs in the settled parts of all the territory newly acquired in America, which was, for that purpose, sub-divided into the four Governments of Quebec, East Florida, West Florida and Grenada, and to encourage further settlement by the promise of the immediate enjoyment of English law. Power was conferred upon the Governors and Councils of the three colonies on the continent to grant such lands as were then or thereafter should be in the power of the Crown to dispose of on such terms and conditions as might be necessary and expedient for the advantage of the grantees and the improvement and settlement of the colonies. So far as lands lay without the limits of these colonies the Governors were forbidden to grant patents or to deal with them, and this chiefly on account of the several nations or tribes of Indians who were living under British protection. That prohibition was to last only "for the present, and till the King's further pleasure" should be known, and it is preceded by a recital that it is just and reasonable and essential to our interest and the security of our colonies that such Indians, with whom we are connected, and who live under our protection, should not be molested

(1) 4 App. Rep., 159; ante vol. 1, p. 838.

(2) 5 Can. S. C. R. 239; ante vol. 1, p. 839.

(3) Ante vol. 3, p. 447.

or disturbed in the possession of such parts of our dominions and [226] territories as not having been ceded to or purchased by us, are reserved for them, or any of them as their hunting grounds.

The proclamation next proceeds to deal with that part of the country which would then embrace the land now in question as follows :-- " And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the lands and territories not included . . . within the limits of the territories granted to the Hudson's Bay Company ; as also, all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west, as aforesaid ; and, we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements, whatsoever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained ; and we do further strictly enjoin and require all persons, whatsoever, who have either wilfully or inadvertently seated themselves upon any lands within the countries above described or upon any other lands, which, not having been ceded to, or purchased by us are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

The proclamation then forbids private persons from presuming to make any purchases from the Indians of any lands reserved to the said Indians, " within those parts of our colonies where we have thought proper to allow settlement," and directs that if at any time the Indians shall be inclined to dispose of the said lands, the same shall be purchased for us at some public meeting of the Indians, to be held for that purpose by the governor of the colony, within which they shall lie.

This proclamation has frequently been referred to, and by the Indians themselves, as the charter of their rights, and the last clause I have condensed, relating to the manner of dealing with them in respect to lands they occupy at large or as a reserve, has always been scrupulously observed in such transactions.

[227] This provisional arrangement, for the government of the country, was superseded by the Quebec Act, (1). The effect of that Act upon the proclamation was two-fold ; by the enlargement of the boundaries of Quebec, the district now in litigation, was brought within colonial limits, and subjected to the control and jurisdiction of the governor. It was taken out of the vague region called the

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(1) *Ante* vol. 3, p. 445.

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"Indian Territories" in 43 Geo. III., cap. 138, (Imp. Statute 1803,) and was made part and parcel of the Province of Quebec. The next effect was that inasmuch as the governmental arrangements made for Quebec by the proclamation, were declared inapplicable to its state and circumstances, all its provisions, so far as related to that province, were revoked, annulled and made void: (Sect. 4 of 13 Geo. III., cap. 83.) New machinery of civil government was provided which, however, was not to interfere with the tenure of land, as by the laws of England or the King's Prerogative. (See sects. 4, 8, 9 and *Doe d. Jackson v. Wilkes*, (1). The proclamation, no doubt, remained operative as a declaration of sound principles, which then and thereafter guided the Executive in disposing of Indian claims, but as indicating for this century the scope of the Indian reservations, or the intent with which they have been created under provincial rule it must be regarded as obsolete. If the proclamation of 1763, and the Constitutional Act of 1867, are to be read as in *pari materia*, and all the intervening years of progress, material, legislative and political, overlooked, then the 40 000 square miles claimed by Ontario, being part of what is covered by the North-West Angle Treaty, is an "Indian Reserve." But in order to emphasise this *reductio ad absurdum* aspect of the case, let what little is known of the people in this remote region be recalled: When the treaty was made, the land it dealt with formed the traditional hunting and fishing ground of scattered bands of Ojibbeways—most of them presenting a more than usually degraded Indian type. They belonged to the Saultaux (i.e., Fallsmen) tribe of the Ojibbeway branch of the great and widespread Algonquin [228] stock. Divided into thirty bands, they numbered all told some 2,600 or 2,700 souls. These only remained as representatives of the primitive possessors of the whole 55,000 square miles of territory, whose claim of occupancy thereon was extinguished by the treaty. If the whole is to be accounted a reserve, this would represent an average of over 9,200 acres for each individual, as against 92 acres which was actually reserved by the treaty, the difference being one thousand fold. If the whole is a reserve, then what was surrendered should be sold for the benefit of the Indians, according to the well understood practice in old Canada, but this was never contemplated. So far from this land being held as reserved for the Indians, the parliamentary, as well as the popular view in modern days, is well illustrated by the Con. Stat. U. C., cap. 128, which relates to unorganized tracts of country, bordering on and adjacent

(1) 4 O. S., p. 147.

to Lakes Superior and Huron, which belong to this province, and they are thus denominated, though sect. 104 speaks of Indians and Half-breeds as frequenting and residing in the same.

There is an essential difference in meaning between the "reservations" spoken of in the Royal Proclamation and the like term in the B. N. A. Act. The proclamation views the Indians in their wild state, and leaves them there in undisturbed and unlimited possession of all their hunting ranges, whereas the Act, though giving jurisdiction to the Dominion over all Indians wild or settled, does not transfer to that government all public or waste lands of the Provinces on which they may be found at large.

The territorial jurisdiction of the Dominion extends only to lands reserved for them. Now it is evident from the history of "the reserves," that the Indians there are regarded no longer as in a wild and primitive state, but as in a condition of transition from barbarism to civilization. The object of the system is to segregate the red from the white population, in order that the former may be trained up to a level with the latter. The key-note of the whole [229] movement was struck unmistakeably in 1888, by Lord Glenelg, in his instructions to Sir Francis Bond Head (appendix to Journals of assembly 1837-8, p. 180). He wrote thus:—"The first step to the real improvement of the Indians is to gain them over from a wandering to a settled life, and for this purpose it is essential that they should have a sense of permanency in the locations assigned to them. That they should be attached to the soil by being taught to regard it as reserved for them and their children by the strongest securities." The distinctive feature of the system in Canada was the grouping of the separate tribes for the purposes of exclusive and permanent residence within circumscribed limits. Those limits were almost invariably allocated at their usual centres of settlement, and within the ambit of their respective hunting ranges as recognized among themselves. Contrasted with this is the plan chiefly followed in the United States, where the main object has been to mass all the Indian nations and tribes in one vast district called the "Indian Territory," which comprises an area of about 70,000 square miles. But in Canada, the bounds of the separate reserves being ascertained by survey or otherwise, the various communities betake themselves thereto as their "local habitation." Here they are furnished with appliances and opportunities to make themselves independent of the precarious subsistence procured from the chase; they are encouraged to advance from a nomadic to an agricultural or pastoral life, and thus to acquire ideas of separate property and of the value of individual

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rights to which in their erratic tribal condition they are utter strangers, so that ultimately they may be led to settle down into the industrious and peaceful habits of a civilized people.

Again: the relations between the Government and the Indians change upon the establishment of reserves. While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they refuse, the Government is not hampered, but has perfect liberty to proceed [230] with the settlement and development of the country, and as soon as or later to displace them. If, however, they elect to treat, they then become, in a special sense, wards of the state, are surrounded by its protection while under pupillage and have their rights assured in perpetuity to the usual land reserve. In regard to this reserve the tribe enjoy practically all the advantages and safeguards of private resident proprietors: *Bastien v. Hoffman* (1). Before the appropriation of reserves, the Indians have no claim, except upon the bounty and benevolence of the Crown; after the appropriation, they become invested with a legally recognized tenure of defined lands, in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense, for the Indians which form the subject of legislation in the B. N. A. Act, i.e., lands upon which, or by means of the proceeds of which, after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. It follows that lands ungranted, upon which Indians are living at large in their primitive state, within any Province, form part of the public lands, and are held as before confederation by that Province under various sections of the B. N. A. Act. (See sect. 92 (item 5), also sects. 6, 109 & 117) Such a class of public lands are appropriately alluded to in sect. 109, as lands belonging to the Province in which the Indians have an interest, i.e., their possessory interest. When this interest is dealt with by being extinguished and by way of compensation in part, reserves were allocated, then the jurisdiction of the Dominion attaches to those reserves. But the rest of the land in which "the Indian title," so called, has not been extinguished, remains with its character unchanged, as the public property of the Province.

The Indian title was in this case, extinguished by the Dominion treaty in 1873, during a dispute with the Province as to the true western boundary of Ontario. (See Dominion Sessional Papers

(1) 17 L. C. R. 238.

[231] 1875, vol. 8, No. 7, paper 8, p. 19). It was proposed in 1872 on behalf of the Dominion, that both governments should agree upon some provisional arrangement and boundary, in order that both might proceed with the granting of land and the issuing of licenses, in distinct parts of this disputed territory, pending the definite settlement of the true line. (See Ontario Sessional Papers, 1873, vol. 5, part 3, paper 44, pp. 6-20.) This arrangement was not carried out till 1874, at which time a provisional boundary line was adopted. The delay arose from the desire of the Dominion to effectuate this treaty. The Minister of the Interior in his official report of June, 1874, (See Dominion Sessional Papers, 1875, vol. 8, No. 7, paper 8), states that as the Indian title to a considerable part of the territory in dispute, had not been extinguished in 1872, it was thought desirable to postpone the negotiations for a conventional arrangement, under which the territory might be opened for sale or settlement, until a treaty was concluded with the Indians (1).

The boundary dispute having been referred to arbitration, an award was made in favour of Ontario, in August, 1878, after which in December, 1879, the Provincial Government notified the other Government that the provisional arrangement was at an end. (See Ontario Sessional Papers, 1880, No. 46, p. 2.) This appears to have been acceded to by the Dominion, in January, 1882, (See Dominion Sessional Papers, 1883, vol. 16, No. 12, paper 95, p. 3,) and both were then understood to be left to assert their respective rights, in reference to all questions involved. A declaration of right to this territory was made in March, 1882, by the Legislature of Ontario, (See Journals of Legislative Assembly of Ontario, 1882, vol. 15, pp. 154-161,) and after this the defendants procured the [232] license to cut timber, which is now the subject of litigation. It appears to me, that the diplomatic attitude of both Governments during this transaction, favours the view that both understood the B. N. A. Act to mean that which I now decide it does mean, as to "Public lands," and "Reserves," and "Indian title."

So also the inter-state dealings, which took place upon and after the admission of British Columbia into the confederation, cast a light upon the whole subject I have been discussing which is favourable to the conclusions at which I have otherwise arrived. Provision

(1) All papers, treaties, etc., relating to this boundary dispute may be found either in the volume entitled "Ontario Boundaries before Privy Council" or in the volume entitled Correspondence, Papers

and Documents of dates from 1856 to 1882 inclusive, relating to the Northerly and Westerly Boundaries of Ontario, printed by order of the Legislative Assembly, by G. Blackett Robinson, Toronto.

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is made in sect. 146 of the B. N. A. Act for the reception of other colonies into the Canadian Union "subject to the provisions of that Act," and, based upon that, the negotiations I am about to mention proceeded.

British Columbia, when a Crown colony, pursued a policy more or less definite with reference to the comparatively settled Indian population there resident, the object of which was to distribute the Indians to a greater extent among the white inhabitants than was deemed desirable by the Government of old Canada. That policy, however, involved the setting apart of tracts of land as reserves for the use of most of the tribes, and these as an invariable rule embraced the village sites, settlements and cultivated lands of the Indians, and of late years it was considered that a reservation in the proportion of ten acres for each family (five being regarded as the family unit) to be held as the joint and common property of the several tribes for their exclusive use and benefit, was a sufficient provision by way of compensation for all their claims upon the rest of the Crown lands. After this colony joined the Canadian Union, discontent arose among the Indians, and it was deemed necessary to devise a scheme for the readjustment of the system of Indian land reserves so as to conform as far as possible, to the customary policy and practice of the older provinces which had been adopted by the Dominion. The thirteenth article of the terms of Union of [233] 1871, (1) provided as follows: "The charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the the union. To carry out such policy tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose shall from time to time be conveyed by the Local Government to the Dominion Government, in trust for the use and benefit of the Indians, on application of the Dominion Government," and in case of disagreement respecting the quantity, the matter was to be referred to the secretary of state for the colonies.

The policy and practice of old Canada being to concentrate the Indians upon reserves and to allot land for such purpose in the pro-

(1) See Dominion Statutes of 1872, p. cii.

portion of at least eighty acres, for each family of five, it was contended on the part of the Pacific Province that such a policy should not be extended to the granting of future reserves, and that the previously existing reserves should not be disturbed. It was alleged that this policy of extensive land reserves, however suitable to the plain and mountain Indians of the North-West, was not adapted to the wants and habits of the maritime Indians. The Provincial and Dominion Governments at last agreed upon a scheme for the settlement of the matters in difference and for the adjustment of the reserves upon these among other terms :

Three commissioners were to be appointed, who, after enquiry on the spot, should fix and determine for each nation separately, the number, extent, and locality of the reserve or reserves to be allotted to it ; no basis of acreage was to be fixed, but each nation should be dealt with separately. In the event of any material increase or decrease, thereafter, of the numbers of a nation occupying a reserve, such reserve was to be enlarged or diminished, as the [234] case might be. "The extra land required by any reserve shall be allotted from Crown lands, and any land taken off a reserve shall revert to the province."

In a large part of the unsettled domain of British Columbia, as I gather from the blue books, the Indian title had not been extinguished. The last provision I have above quoted, was inserted in consequence of the contention of the Dominion that the quantity of land proposed to be assigned by the local government was inadequate, even for the present necessities of the tribes, and, that when land matters were involved, the claims of the red men were entirely subordinated to those of the whites.

Several deductions may, I think, be fairly made from these transactions : (1) That the term "reserves" had the same well defined scope and meaning in British Columbia as in the other members of the union ; (2) That the lands from which the reserves were to be set apart by the province, on the application of the Dominion, were Crown or public lands, though inhabited at large by Indians ; (3) That when the purposes of the reserve were satisfied by the diminution, or absorption, or disappearance of the Indians, the land freed from that trust was to revert from the Dominion to the province, and to be dealt with thereafter as ordinary public lands ; (4) Underlying the whole there is an affirmance of the constitutional

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propositions, that the claim of the Indians, by virtue of their original occupation, is not such as to give any title to the land itself, but only serves to commend them to the consideration and liberality of the government upon their displacement, that the surrender to the Crown by the Indians of any territory adds nothing in law to the strength of the title paramount, and that in the case of reserves created after confederation, when the purposes are ended for which the appropriation of the land was made, the title, legal and equitable, reverts from the Dominion, whose trusteeship has thus ceased, to the proper constitutional owner; i. e., the province wherein the lands are territorially situate.

As the Dominion claimed this territory at the time of the North-
 [235] West Angle Treaty, that treaty was concluded ex parte so far as Ontario is concerned. But, as in the case of British Columbia, when the province is the owner of the public lands, and for the purposes of settlement, it is needful to extinguish the Indian title and allot reserves, it may well require the co-operation of both the General and the Local Governments in order properly to adjust the terms and details. It would seem unreasonable that the Dominion Government should be burdened with large annual payments to the tribes without having a sufficiency of land to answer presently or prospectively the expenditure, and it would also seem unreasonable to allot reserves in the absence of the province, whose schemes for opening up the country might be prejudiced by the reserves being unsuitably placed. However that may be in the present case, my judgment is that the extinction of title, procured by and for the Dominion, enures to the benefit of the province as constitutional proprietor by title paramount, and that it is not possible to preserve that title or transfer it in such wise as to oust the vested right of the province to this as part of the public domain of Ontario.

Whatever equities—I use this word for want of a more suitable—may exist between the two governments, in regard to the consideration given and to be given to the tribes, that is a matter not agitated on this record.

I have thought it fitting, because of the magnitude of the interests at stake, and because of the earnest and elaborate arguments on both sides, to give at, perhaps, unnecessary length, the reasons which have induced me to decide as I do.

Judgment will be entered for the plaintiff, with costs, and in terms as prayed.

PRIVY COUNCIL.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA

Appellant ;

AND

THE ATTORNEY-GENERAL OF CANADA *Respondent*.

On appeal from the Supreme Court of Canada.

(Reported 14 App. Cas. 295.)

British North America Act, 1867, s. 109—Rights of the Province to the Precious Metals—Conveyance of "Public Lands."

Held, that a conveyance by the Province of British Columbia to the Dominion of "public lands" being in substance an assignment of its right to appropriate the territorial revenues arising therefrom, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown. The precious metals in, upon and under such lands are not incidents of the land but belong to the Crown, and, under sect. 109 of the British North America Act of 1867, beneficially to the Province, and an intention to transfer them must be expressed or necessarily implied.

Appeal from a judgment of the Supreme Court of Canada (Dec. 13, 1887) confirming the judgment of a Judge of the Exchequer Court of Canada upon a case stated under "The Supreme and Exchequer Court Act," and Columbian Act, 45 Vict. c. 2.

The case stated was as follows :—"The Attorney-General of Canada alleges, and the Attorney-General of British Columbia denies, that the precious metals in, upon, and under the public lands mentioned in sect. 2 of the Columbian Act, 47 Vict. c. 14, are vested in the Crown as represented by the Government of Canada, and not as represented by the Government of British Columbia."

**Present* :—THE LORD CHANCELLOR, LORD WATSON, LORD FITZGERALD, LORD HOBHOUSE and LORD MACNAGHTEN.

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The way in which the controversy arose is stated in the judgments of their Lordships. The report of the case in the Supreme Court will be found in 14 Sup. Ct. (Canada) p. 345. (1)

The Supreme Court decided by three judges out of five in favour of the respondent.

[296] Ritchie C. J., held that the principle applicable to the case of grants of land from the Crown to a subject was not applicable to the present case, which was not the case of a grant or conveyance at all but of a statutory transfer to the Dominion by the Province of British Columbia of the right of that Province to the public lands in question, the title to the lands remaining throughout in the Crown. He held that the expression "public lands" was sufficient to pass the interest in question. He also relied upon the wording of a British Columbia minute of the 10th of February, 1883, as shewing how the transactions in question were understood by the Provincial Government.

Gwynne, J. (Taschereau, J., consenting) agreed with the Chief Justice, and relied upon the fact that nearly the whole of the belt of territory in question consists of mountain lands which are of no value for agricultural or other surface purposes, and that the value for surface purposes of such small portion thereof as consists of land in the valleys of the mountain streams is reduced to a minimum by reason of the large powers conferred upon the mining owner as against the surface owner by the Mining Acts of British Columbia, which Acts enable the former to enter upon the lands of the latter and to dispossess him upon payment of compensation, and to appropriate the water from the mountain streams, and

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(1) *post* p. 255.

consequently that unless the precious metals pass to the Dominion the cession is illusory and of no value.

Fournier, J., held that the transfer under which the lands in question passed to the Dominion was in effect a contract between the Queen as chief of the Executive Government of the Province, and the Queen as chief of the Executive Government of the Dominion, whom for this purpose he held to be in effect different legal persons, and that to this contract the principles enumerated in the *Earl of Northumberland's Case* (1) applied. He considered that the words "public lands" in the British Columbia Act, 47 Vict. c. 14, did not transfer the right to the precious metals on or under such lands, that in sect. 109 of the British North America Act, 1867, the words "mines and minerals" are specified in addition to [297] lands, and he drew a distinction in this respect between those words in the 109th section of that Act, and the words "public lands" in the 91st section of the same Act, which latter words he held were used in a sense exclusive of mines and minerals. He was also of opinion that the legislative control over the lands in question would pass to the Dominion. Henry, J., based his judgment upon a previous decision of his own, in a case of *The Queen v. Farwell* (2) in 1886, in which he decided that the title to the lands in question was not vested in the Queen.

Sir Horace Davey, Q. C., Jeune, Q. C., and Clay, for the appellant, contended that this decision was erroneous. As to the prerogative right of the Crown to the precious metals found in mines reference was made to *In re Earl of Northumberland's Mines* (1) and to *Woolley v. Attorney-General of Victoria* (3). It is a rule of law, settled

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(1) 1 Plowd. 310.

(2) 14 Can. S. C. R. 392.

(3) 2 App. Cas. 163.

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by those authorities, that this prerogative right will not pass under a grant of land by the Crown unless by apt and precise words the intention of the Crown that it should pass is expressed. By the British North America Act, 1867, sect. 109, and sect. 10 of the Order in Council (May 16th 1871) by which the Province of British Columbia was admitted into union with the Dominion of Canada, that prerogative right remained vested in the Crown on behalf of the Province. Reference was made to British Columbian Acts 43 Vict. No. 11, and 47 Vict. c. 14. No transfer of prerogative right was effected thereby, nor by the grant in question made by the Province to the Dominion Government. That grant was in reality a grant of land to the Canadian Pacific Railway Company to aid in the construction of the railway. The lands in reference to which this question has arisen have not ceased to be part of the Province and subject to provincial legislation. Mining for gold and silver in these lands is regulated by the Provincial Gold Mining Ordinance, 1867, sects. 4 and 15, and by the Mineral Act, 1884. Under those Acts miners must be licensed by certificate of the Provincial authorities. See also the Land Act, 1875, sects. 80 and 81, and Land Act, 1884, sects. 64, 65 which [298] reserve to such miners the right to enter on lands alienated by the Crown and search therein for precious metals. This is inconsistent with an intention to transfer to the Dominion the prerogative rights of the Crown to precious metals found in provincial territory. The claim of the Dominion is in violation of British North America Act, 1867, sect. 109: see *Attorney-General of Ontario v. Mercer*. (1)

*Rigby*, Q. C., *Sedgewick*, Q. C., (Canada), and *Gore*, for the respondent, contended that the principle established

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(1) 8 App. Cas. 767; ante vol. 3, p. 1.

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by the cases in Plowden's Reports and 2 App. Cas. did not apply. This is not the case of a grant of land from the Crown to a subject. No question is involved of a grant from the Crown nor any question as between the Crown and a subject. The title to the belt of territory in question remained in the Crown after the cession by the Province to the Dominion, just the same as before the cession. The cession was made by the Queen as represented by the Province to the Queen as represented by the Dominion. Under these circumstances the expression "lands" prima facie includes the prerogative right of the Crown to the precious metals upon and under the soil of such property. Such a right is an ordinary incident to the title to the soil on the part of the Crown. "Public lands" in sect. 92 of the British North America Act, 1867, do not exclude mines and minerals upon such lands. If mines and minerals were excluded therefrom the legislative control over the sale and management thereof in the Province would not belong to the Province under sect. 92 but would be vested in the Dominion under sect. 91. This would be contrary to the case on both sides, as shewn by the whole course of provincial and dominion legislation since 1867. "Public lands" in sect. 92 are equivalent to the several descriptions of landed property specified in sect. 109, that is, include the precious metals. The same expression has the same meaning when used in art. 11 of the terms of Union and in sect. 2 of British Columbian Act, 47 Vict. c. 14. Consequently the right to the precious metals in question passed to the Dominion Government, and is no longer vested in the Province.

[299] Sir *Horace Davey*, Q. C., replied.

The judgment of their Lordships was delivered by

LORD WATSON :—

The question involved in this appeal is one of considerable interest to the parties, but it will be found to lie within a very narrow compass, when the facts, as to which there is no dispute, are explained.

By an Order in Council, dated the 16th of May, 1871, Her Majesty, in pursuance of the enactments of sect. 146 of the British North America Act, 1867, was pleased to ordain that the Province of British Columbia should, from the 29th day of July following, be admitted into and form part of the Dominion of Canada, subject to the provisions of that Act and to certain articles of Union which had been duly sanctioned by the Parliaments of Canada and by the Legislature of British Columbia. The eleventh of the Articles of Union is in these terms :—

“ 11. The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected east of the Rocky Mountains towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

“ And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in

the North-West Territories and the Province of Manitoba. Provided, that the quantity of land which may be held under pre-emption right, or by Crown grant, within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government shall be made [300] good to the Dominion from contiguous public lands; and, provided further, that until the commencement within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the Union, the sum of \$100,000 per annum, in half-yearly payments in advance."

After the union, owing to engineering and other difficulties, there was considerable delay in constructing the line of railway through British Columbia. Various differences arose between the two Governments, and these were ultimately settled, in the year 1883, by a provisional agreement, which was subsequently ratified by the respective legislatures of Canada and the Province. Part of the agreement had reference to the 11th Article of Union, which it modified to the following extent. The Government of British Columbia agreed to convey to the Government of the Dominion, as therein provided, the public lands along the railway, wherever it might be finally located, to a width of twenty miles on either side of the line, and, in addition, to convey to the Dominion Government three and a half millions of acres of land in the Peace River District, in one rectangular block, east

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of the Rocky Mountains, and joining the North-west Territory of Canada. On the other hand, the Dominion Government undertook, with all convenient speed, to offer for sale the lands within the railway belt, on liberal terms, to actual settlers; and also to give to persons who had squatted on these lands a prior right of purchasing the lands improved, at the rates charged to settlers generally. In accordance with this agreement, the lands forming the railway belt were granted to the Dominion Government, in terms of the 11th Article of Union, by an Act of the Legislature of British Columbia, 47 Vict. c. 14, s. 2.

In 1884, a controversy arose between the Dominion and the Provincial Government in regard to the gold, which had then been found to exist in considerable quantities [301] within the forty mile belt. With the view of judicially ascertaining which of them was entitled to it, a special case was adjusted, commendable for its brevity, which simply states the issue to be, whether the precious metals in, upon, and under the lands within the forty mile belt are vested in the Crown, as represented by the Government of Canada, or as represented by the Government of British Columbia. The case was first presented to the Exchequer Court of Canada, who, after hearing parties on the merits, gave a formal judgment in favour of the Dominion. On appeal, his judgment was, after a full hearing, affirmed by a majority of the Supreme Court of Canada, consisting of Sir William C. J., with Taschereau and Gwynne, JJ., the dissenting members of the Court being Fournier and J. R. Brown.

It was not disputed in the arguments addressed to this Court that the question raised in the special case must be decided according to the principles of the law of

England, which "so far as not from local circumstances inapplicable" was extended to all parts of the colony of British Columbia by the English Law Ordinance, 1867.

Whether the precious metals are or are not to be held as included in the grant to the Dominion Government, must depend upon the meaning to be attributed to the words "public lands" in the 11th Article of Union. The Act 47 Vict. c. 14, s. 2, which was passed in fulfilment of the obligation imposed upon the Province by that article and the agreement of 1883, defines the area of the lands, but it throws no additional light upon the nature and extent of the interest which was intended to pass to the Dominion. The obligation is to "convey" the lands, and the Act purports to "grant" them, neither expression being strictly appropriate, though sufficiently intelligible for all practical purposes. The title to the public lands of British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom, had been transferred to the Province, before its admission into the federal union. Leaving the precious metals out of view for the present, it seems clear that the only "conveyance" [302] contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the Province, nor that the Dominion Government should occupy the position of a freeholder within the Province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of, the interest of the Dominion comes to an end. The land then ceases to be public land, and reverts to the same position as if it had

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been settled by the Provincial Government in the ordinary course of its administration. That was apparently the consideration which led to the insertion, in the agreement of 1883, of the condition that the Government of Canada should offer the land for sale, on liberal terms, with all convenient speed.

According to the law of England, gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land, and the baser metals which it contains, stands upon a different title from that to which its right to the precious metals must be ascribed. In the *Mines Case* (1) all the justices and barons agreed that in the case of the baser metals, no prerogative is given to the Crown; whereas "all mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." In British Columbia the right to public lands and the right to precious metals in all provincial lands, whether public or private, still rest upon titles as distinct as if the Crown had never parted with its beneficial interests; and the Crown assigned these beneficial interests to the Government of the Province, in order that they might be appropriated to the same state purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected [303] with land or minerals in British Columbia, these

(1) 1 Plowd. 336, 336a.

revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the Province of "public lands" which is, in substance, an assignment of its right to appropriate the territorial revenues arising from such lands, does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

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The grounds upon which the majority of the learned judges of the Supreme Court decided in favour of the Dominion are briefly and forcibly stated in the judgment delivered by Sir William Ritchie, C. J. They were of opinion that the rule of construction which excepts the precious metals from a conveyance of land by the Crown to a subject has no application to the provisions of the 11th Article of Union, which they regarded as a statutory compact between two constitutional governments. The learned Chief Justice said: "This was a statutory arrangement between the Government of the Dominion and the Government of British Columbia, in settlement of a constitutional question between the two Governments, or rather giving effect to and carrying out the constitutional compact under which British Columbia became part and parcel of the Dominion of Canada, and, as a part of that arrangement, the Government of British Columbia relinquished to the Dominion of Canada, as represented by the Governor General all right to certain public lands belonging to the Crown, or to the Province of British Columbia, as represented by the Lieutenant Governor." (1)

If the 11th Article of Union had been an independent treaty between the two Governments, which obviously contemplated the cession by the Province of all its interests in the land forming the railway belt, royal as

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(1) 14 Can. S. C. R. p. 357 ; *post* p. 259.

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well as territorial, to the Dominion Government, the conclusion of the court below would have been inevitable. But their Lordships are unable to regard its provisions in that light. The 11th article does not appear to them to constitute a separate and independent compact. It is part of a general statutory arrangement, of which the leading enactment is, that, on its admission to the federal union, British Columbia shall retain all the rights and interests assigned to it by the provisions of the British [304] North America Act, 1867, which govern the distribution of provincial property and revenues between the Province and the Dominion; the 11th article being nothing more than an exception from these provisions. The article in question does not profess to deal with *jura regia*; it merely embodies the terms of a commercial transaction, by which the one Government undertook to make a railway, and the other to give a subsidy, by assigning part of its territorial revenues.

Their Lordships do not think it admits of doubt, and it was not disputed at the bar, that sect. 109 of the British North America Act must now be read as if British Columbia was one of the provinces therein enumerated. With that alteration, it enacts that "all lands, mines, minerals, and royalties," which belonged to British Columbia at the time of the union, shall for the future belong to that province and not to the Dominion. In order to construe the exception from that enactment, which is created by the 11th Article of Union, it is necessary to ascertain what is comprehended in each of the words of the enumeration, and particularly in the word "royalties." The scope and meaning of that term, as it occurs in sect. 109, underwent careful consideration in the case of *Attorney-General of Ontario v. Mercer* (1)

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(1) 8 App. Cas. 767; *ante* vol. 3, p. 1.

which was appealed to this Board by the Dominion Government, in name of the defendant Mercer. In that case their Lordships were of opinion that the mention of "mines and minerals" in the context was not enough to deprive the word "royalties" of what would otherwise have been its proper force. (2). The Earl of Selborne, in delivering the judgment of the Board said (3): "It appears, however, to their Lordships to be a fallacy to assume that because the word 'royalties' in this context would not be regarded as inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals, even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronae*."

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It is not necessary for the purposes of this appeal to [305] consider whether the expression "royalties" as used in sect. 109 includes *jura regalia* other than those connected with lands, mines and minerals. *Attorney-General of Ontario v. Mercer* (1) is an authority to the effect that, within the meaning of the clause, the word "royalties" comprehends, at least, all revenues arising from the prerogative rights of the Crown in connection with "lands, mines and minerals." The exception created by the 11th Article of Union, from the rights specially assigned to the Province by sect. 109 is of "lands" merely. The expression "lands" in that article admittedly carries with it the baser metals, that is to say "mines" and

(2) 8 App. Cas. 777; *ante* vol. 3 p. 13. (3) 8 App. Cas. 778; *ante* vol. 3, p. 14.

(1) 8 App. Cas. 767; *ante* vol 3, p. 1.

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"minerals" in the sense of sect. 109. Mines and minerals in that sense are incidents of land, and, as such, have been invariably granted, in accordance with the uniform course of Provincial legislation, to settlers who purchase land in British Columbia. But *jura regalia* are not accessories of land; and their Lordships are of opinion that the rights to which the Dominion Government became entitled under the 11th article did not, to any extent, derogate from the Provincial right to "royalties" connected with mines and minerals under sect. 109 of the British North America Act.

Their Lordships do not doubt that the 11th Article of Union might have been so expressed as to shew, by necessary implication, that some or all of the royalties dealt with by sect. 109 were to pass to the Dominion along with the lands constituting the railway belt. But there is not a single expression in the context which is applicable to gold or gold-mining rights. On the other hand, the whole terms of the Articles of Union, as well as of the subsequent agreement of 1883, appear to their Lordships to point to the conclusion that the high contracting parties were dealing with public lands, in so far as these were available for the ordinary purposes of settlement, and had either excluded gold mines from their arrangements, or had them not in contemplation. It is right, however, to notice that the learned Chief Justice refers to a minute of the Council of British Columbia containing the recommendation of a committee which was communicated to the Government of Canada, as evidencing an understanding, on the part of the Provincial Government [306] that mines of gold and other precious metals were to be conveyed along with the belt lands. The passage upon which the learned Chief Justice relies is in these terms:—"That it be one of the conditions that the

Dominion Government, in dealing with lands in this Province, shall establish a land system equally as liberal, both as to mining and agricultural industries, as that in force in this Province, at the present time, and that no delay take place in throwing open the land for settlement." (1) The words "mining and agricultural industries," taken per se, might be of dubious import, because they would not disclose whether gold digging was referred to as one of the mining industries. But these industries are described as an integral part of the "land system;" and when it is considered that, at the date of the report the system of land settlement in the Province, which included the baser metals, was regulated by special statute and that gold mines, which were not given off to settlers, were not treated as part of that system, but were the subject of separate legislation, it becomes apparent that the committee did not make any reference to gold in their recommendation.

Their Lordships are for these reasons of opinion that the judgment appealed from must be reversed, and that it ought to be declared that the precious metals within the railway belt are vested in the Crown, subject to the control and disposal of the Government of British Columbia, and they will humbly advise Her Majesty to that effect. There will be no order as to costs.

#### JUDGMENTS IN SUPREME COURT OF CANADA.

[*Reported 14 Can. S. C. R. 245.*]

RITCHIE, C.J.—

By the 11th paragraph of the Order in Council, under which British Columbia was admitted into the union, it is provided :—

"And the Government of British Columbia agree to convey to the

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(1) 14 Can. S. C. R. p. 361 ; *post* p. 262.



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Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length of British Columbia (not to exceed, however, twenty (20) miles on each side of the said line) as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba : Provided that the quantity of land which may be held under pre-emption right or by crown grant within the limits of the tract of land in British Columbia, to be so conveyed to the Dominion Government, shall be made good to the Dominion from contiguous public lands ; and provided further, that until the commencement, within two years, as aforesaid, from the date of the Union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other [355] way than under right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia from the date of the Union, the sum of \$100,000 per annum, in half-yearly payments in advance."

On the 8th of May, 1880, the Legislature of British Columbia passed the following statute :—

"An Act to authorize the grant of certain public lands on the mainland of British Columbia to the Government of the Dominion of Canada for Canadian Pacific Railway purposes :—

"Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows :—

"1. From and after the passing of this Act, there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway line located between Burrard Inlet and Yellow Head summit, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, a similar extent of public lands along the line of railway before mentioned (not to exceed twenty miles on each side of the said line) as may be appropriated for the same purpose by the Dominion from the public lands of the North-West Territories and the Province of Manitoba, as provided in the Order in Council, section 11, admitting the Province of

British Columbia into confederation. The land intended to be hereby conveyed is more particularly described in a despatch to the Lieutenant-Governor from the Honourable the Secretary of State, dated the 31st day of May, 1878, as a tract of land lying along the line of said railway, beginning at English Bay or Burrard Inlet and following the Fraser River to Lytton; thence by the valley of the River Thompson to Kamloops; thence up the valley of the North Thompson, passing near to Lakes Albreda, and Cranberry, to Tete Jaune Cache: thence up the valley of the Fraser River to the summit of Yellow Head, or boundary between British Columbia and the North-West Territories, and is also defined on a plan accompanying a further despatch to the Lieutenant-Governor from the said Secretary of State, dated the 23rd day of September, 1878. The grant of the said land shall be subject otherwise to the conditions contained in the said 11th section of the terms of union.

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“2. This Act shall not affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

[356] “3. This Act may be cited as ‘An Act to grant public lands on the mainland to the Dominion in aid of the Canadian Pacific Railway, 1880.’”

In August, 1883, the Hon. Sir Alexander Campbell, Minister of Justice, visited British Columbia, and adjusted with the provincial government certain matters in difference between the two governments, which adjustment led to the passage of the provincial statute referred to in the case.

The following is a copy of the statute:—

47 Vict. c. 14. “An Act relating to the Island Railway, the Graving Dock, and Railway lands of the province.

[19th December, 1883.]

“Whereas negotiations between the Governments of Canada and British Columbia have been recently pending, relative to delays in the commencement and construction of the Canadian Pacific Railway and relative to the Island Railway, the Graving Dock, and the Railway lands of the province.

“And whereas for the purpose of settling all existing disputes between the two governments it hath been agreed as follows:—”

The agreement is then set out at length and the Act proceeds:—

“Therefore Her Majesty, by and with the advice and consent of

189 the Legislative Assembly of the Province of British Columbia, enacts  
as follows :—

“ 1. The hereinbefore recited agreement shall be and is hereby  
ratified and adopted.

“ 2. Section 1 of the Act of the Legislature of British Columbia,  
No. 11 of 1880, intituled ‘ An Act to authorize the grant of certain  
public lands on the mainland of British Columbia to the Govern-  
ment of the Dominion of Canada for Canadian Pacific Railway  
purposes,’ is hereby amended so as to read as follows :—

“ From and after the passing of this Act there shall be, and there  
is hereby granted to the Dominion Government for the purpose of  
constructing and to aid in the construction of the portion of the  
Canadian Pacific Railway on the mainland of British Columbia, in  
trust, to be appropriated as they may deem advisable, the public lands along the line of the railway before  
mentioned, wherever it may be finally located, to a width of twenty  
miles on each side of the said line, as provided in the Order in  
Council, sect. 11, admitting the Province of British Columbia into  
[357] confederation ; but nothing in this section contained shall  
prejudice the right of the province to receive and be paid by the  
Dominion Government the sum of \$100,000 per annum, in half-  
yearly payments in advance, in consideration of the lands so con-  
veyed, as provided in sect. 11 of the Terms of Union ; provided  
always, that the line of railway before referred to shall be one  
continuous line of railway only, connecting the sea-board of British  
Columbia with the Canadian Pacific Railway now under construc-  
tion on the east of the Rocky Mountains.

“ 3. There is hereby granted to the Dominion Government, for  
the purpose of constructing, and to aid in the construction of a  
railway between Esquimalt and Nanaimo, and in trust to be  
appropriated as they may deem advisable (but save as is herein-  
after excepted), all that piece or parcel of land situate in Vancouver  
Island, described as follows :—

Then follows a description of the land and in addition No. 7 :—

“ 7. There is hereby granted to the Dominion Government three  
and a half million acres of land in that portion of the Peace River  
district of British Columbia lying east of the Rocky Mountains and  
adjoining the North West Territory of Canada, to be located by  
the Dominion in one rectangular block.”

On the argument of this case it was not contended on the part of  
the Province of British Columbia that the lands mentioned in  
section 2 of the Act of British Columbia, 47 Vict, c. 14, did not

pass to the Dominion Government. The sole question raised and argued is, as to the right to the precious metals in, upon or under those lands.

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The principle acted on in the construction of grants or conveyances to private persons, namely, that by a grant of land from the Crown the precious metals would not pass unless the intention of the Crown that they should pass was expressed in apt and precise words, is in no way, in my opinion, applicable to the present case. This is not to be looked upon as a transaction between the Crown and a private individual, or to be governed by principles applicable to transfers between private parties. This was a statutory arrangement between the government of the Dominion and the government of British Columbia, in settlement of a constitutional [358] question between the two governments, or rather, giving effect to, and carrying out, the constitutional compact under which British Columbia became part and parcel of the Dominion of Canada, and as a part of that arrangement the government of British Columbia relinquished to the Dominion of Canada, as represented by the Governor-General, all right to certain public lands belonging to the Crown, or to the Province of British Columbia as represented by the Lieutenant-Governor; it was a statutory transfer or relinquishment by the Province of British Columbia of the right of that province in or to such public lands to the Dominion of Canada to be managed, controlled, and dealt with by the Dominion government in as full and ample a manner as the provincial government could have done, had no such Act been passed, and, in my opinion, having the same force and effect as if the B. N. A. Act, instead of declaring that the several provinces should retain all their respective public property, etc., and that all lands belonging to the several provinces should continue to belong to the several provinces, there had been engrafted thereon an exception of certain portions of such public lands which should belong to the Dominion Government. This, it seems to me, is just what the legislature of British Columbia intended to do and did do. There was no necessity for any grant or conveyance; in fact there could be no grant or conveyance from the Crown to the Crown. The title to the land was never out of the Crown, but was in the Crown as represented by the Lieutenant-Governor of British Columbia; and when the Legislature of British Columbia granted to the Dominion of Canada the interest the Province of British Columbia had in these public lands the right to deal with, and dispose of, the lands which belonged to the Province of British

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Columbia passed, by operation of the statute, to the use and control [359] of the Dominion government as represented by the Governor-General, to be dealt with by the Dominion Government in all respects as the Province of British Columbia could have done, the title to the lands, as I said before, continuing throughout in the Crown, the disposal of the lands or the right of dealing with that title being simply transferred from the government of British Columbia to the government of the Dominion, and consequently whatever control over, or right or interest the Province of British Columbia had in these lands when subject to the control of the government of British Columbia ceased by the legislation of British Columbia, and such control, rights and interest were thereby transferred to the government of Canada in as full and ample a manner as they had been held and enjoyed by the Province of British Columbia.

The only reservation or limitation on the Dominion Government in the appropriation of public lands along the line of railway is to be found in the second section of the Act of British Columbia, passed on the 8th of May, 1880, which provides that "this Act shall not affect or prejudice the rights of the public with respect to common or public highways existing at the date thereof within the limits of the lands hereby intended to be conveyed." Beyond this I can discover no exception or reservation, narrowing or limiting the right of the Crown, as represented by the Dominion Government, from that possessed by the Government of British Columbia as representing the Crown previous to the transfer, and therefore, in my opinion, the prerogative rights of the Crown in such public lands simply continued in the Crown as represented by the Dominion of Canada instead of in the Crown as represented by the Government of British Columbia.

If we look at the negotiations which preceded the final arrangement [360] as set out in the Act it will, I think, appear tolerably clear, as a matter of fact, that it was the intention of the government of British Columbia that the mines should pass to and be under the control of the Dominion government. This appears to me to be indicated in the British Columbia minute of council, dated 10th February, 1883, and transmitted to the government of Canada on the same day. The council having had under consideration the subject of the dry dock, railway lands and the island railway, reported, after dealing with the dry dock question and after discussing the island railway question and affirming the obligation of the Dominion Government to build it as a part of the Canadian Pacific

Railway, the committee proceeded to discuss the subject of the railway lands of British Columbia, and the report *inter alia* says :—

“That the committee by an order in council of 4th May, 1880, stated that in the event of railway work being actively prosecuted, the application of the Dominion Government through Mr. Trutch contained in Mr. Trutch’s letter of the 14th April, 1880, should receive a liberal consideration, and suggested that the lands which might be considered valueless for agricultural or economic purposes should be defined, and that the Dominion Government should indicate the lands which might be desired in lieu of the valueless lands, and to state how the Dominion Government proposed to deal with them. That Mr. Trutch replied to this order by a letter dated 8th May, 1880, to which no reply appears to have been given.

“It is admitted that a very considerable portion of the lands included in the railway belt, and of the lands contiguous to those lands which have been dealt with by the province, consist of impassable mountains and rocky lands useless for agricultural purposes.

“The committee feel satisfied that a settlement of this question will conduce to the best interests of the province and enable the country to settle up.”

And the committee go on to say :—

“That the land on the east coast of Vancouver Island has been continuously withheld from settlement since July, 1873, up to the present time, and the development of that fertile tract of country abounding in mineral wealth has been retarded to an incalculable extent, and the commercial and industrial interests of an important section of the province have been prejudicially affected to a serious [361] degree.

“The committee therefore recommend as a basis of settlement between the Governments of the Dominion and the province of the railway and railway lands question, that the Dominion Government be urgently requested to carry out its obligation to the province by commencing at the earliest possible period the construction of the island railway, and complete the same with all practicable despatch; or by giving to the province such fair compensation for failure to build such island railway as will enable the government of the province to build it as a provincial work and open the east coast lands for settlement and that the Dominion Government be earnestly re-

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requested to take over the graving dock at Esquimalt, upon such terms as shall recoup and relieve the province of all expense in respect thereof, and to complete and operate it as a Federal work, or as a joint Imperial and Dominion work, and the committee further recommend that in lieu of any expensive and dilatory method of ascertaining the exact acreage of lands alienated within the railway belt and otherwise rendered unavailable, there be set apart for the use of the Dominion, a tract of land of 2,000,000 acres in extent to be taken up in blocks of not less than 500,000 acres in such localities on the main land as may be agreed upon, the land to be taken up and defined within two years, and that it be one of the conditions that the Dominion Government in dealing with lands in this province shall establish a land system equally as liberal both as to mining and agricultural industries, as that in force in this province at the present time, and that no delay take place in throwing open the land for settlement.

"The committee advise that the recommendations be approved, and that a copy be forwarded to the Honourable Secretary of State for Canada."

What is the meaning of this last paragraph if it is not that the Government of British Columbia knew and intended that, in dealing with the public lands in the province, the Dominion government was to have the control of such public lands including both mining and agricultural industries connected therewith? And how could they deal with the mining industries if no interest in, or control over, the mines passed to the Dominion government? That apart from this when the public lands of the province, set apart by the legislation of the Province of British Columbia for the construction of the Canadian Pacific Railway, ceased by such legislation to belong [362] to that province that province necessarily ceased to have any interest in the mines under these lands, because the province only obtained an interest in the mines by reason of their being part and parcel of the public lands of the province; when therefore, the public lands in question ceased to be the public lands of the province, the mines forming part of such public lands, as a necessary consequence, ceased to belong to the province. No doubt the mines might have been reserved to the province, but such not having been the case, they passed to the Dominion as part and parcel of the public lands granted to them by the Province of British Columbia.

[Translated.]

FOURNIER, J. :—

The question raised in this case is, whether the Federal Government or the Local Government of British Columbia has the property in the mines of precious metals granted by the latter government to the former in aid of the construction of the Canadian Pacific Railway? If the point was as to the rights of the Crown to the mines of gold and silver included in a grant to a subject, the question would be free from difficulty. It was settled long ago by English decisions which are deemed to lay down the law on this subject; and especially by *The Great Case of Mines* (1). And reference may be made to the discussion of this case in Brown's edition (1878) of Bambridge's *Treatise on the Law of Mines and Minerals*, pp. 122, 128. In a case of *Woolley v. Attorney-General of Victoria* (2) Sir James Colvile in giving judgment expressed himself as follows: "Now, whatever may be the reasons assigned in the case in *Plowden* for the rule thereby established, and whether they approve themselves or not to modern minds, it is perfectly clear that ever since that decision it has been settled law in [363] England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass." The law of England on this subject unquestionably forms part of the law of British Columbia. It follows that the principle laid down in the foregoing decision "that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown, unless by apt and precise words the intention of the Crown be expressed that it shall pass," must be applied here.

The fact that the grant in this case was not to a subject, but purported to be made by the Crown to the Crown has been thought to furnish an argument by which this question can be solved. It has been said indeed that it would obviously be absurd to suppose that Her Majesty could treat or contract with herself. The learned counsel for the respondent contends that Her Majesty being always invested with the right to the lands and mines in question, the Act of 47 Vict., c. 14 has no effect beyond declaring that the lands of

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(1) Plow. 310.

(2) 2 App. Cas. 163, 168.



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which the Crown was up to that time seized in the name of British Columbia were thenceforth to be vested in the Crown for the benefit of the Dominion of Canada. But this is merely to repeat the question under consideration and not to answer it.

In our system of government, Her Majesty as head of the executive, whether federal or provincial, must be deemed to be present in each government, having in each the rights and prerogatives given her by the B. N. A. Act. As chief of these different governments, she is not to be considered as present in her character of Queen of the British Empire, but only as Queen, and exercising only those rights and prerogatives to her assigned by the laws and constitution of each government. It is not true in fact to say that Her Majesty as chief of the Federal executive is the same legal personage as Her Majesty regarded as chief of the Provincial executive, [364] for we cannot then distinguish the different, and not seldom, conflicting attributes which the Constitution confers upon her. Certainly there is nothing anomalous, much less absurd, in saying that the Queen represented by the Provincial executive of British Columbia can treat or contract with the Queen represented by the Federal executive without its being possible for either of these governments either to lose or gain anything thereby. They will only be bound by the agreements entered into between them. The Queen represents them both within the limits of their respective powers, and in fact it is the two governments which contract together with her consent. The naked general proposition laid down without any qualification by the learned counsel for the respondent, that "The title to land and to the minerals has at all times been in the Crown" might be true if it were only a question as to property belonging to Her Majesty by virtue of her royal prerogative, but when applied to the property with which Her Majesty is invested by force of a provincial statute, it is only true so far as modified by the restrictions imposed by the statute or by those which might be attached thereto by provincial legislation.

By sect. 92, sub-a. 5 of the B. N. A. Act the sale and management of public lands and woods and forests belong to the Province. Section 109 goes further and declares that not only the lands but the mines, minerals and royalties shall also belong to the Provinces. The language of these sections shews that it was not supposed that the property in the mines has passed by implication with the

soil, since that was made the subject of a separate disposition. Moreover by the decision of this Court and confirmed by the Privy Council, in the case of *Attorney-General v. Mercer* (1) the expression "royalties" in section 109 has been interpreted as [365] including the royal prerogatives on the subject of property. Mines of gold and silver therefore under the B. N. A. Act belong to the provinces, and their respective governments alone have the right to exercise the royal prerogative in this respect. It follows that this prerogative can neither be surrendered nor modified unless by an act of the legislative or executive power of the provincial governments, alienating the same in terms explicit and unqualified.

Can we then in the agreement entered into between the two governments as to the entry of British Columbia into confederation, or in the legislation of the respective governments upon the subject of grant of lands in aid of the construction of the Canadian Pacific Railway, find any dispositions or expressions involving an express surrender of the mines of gold and silver contemporaneously with that of the lands? To ascertain this we must refer to the main transactions of the two governments on this matter. By the eleventh paragraph of the conditions agreed upon by the respective governments, the Federal government bound itself within two years from the Act of union to commence the construction of the Canadian Pacific Railway, which was one of the conditions of the entry of British Columbia into confederation.

The Government of British Columbia on their part in aid of the construction of that road became bound as follows: "To convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway, a similar extent of public lands along the line of the railway throughout its entire length in British Columbia, not to exceed, however, twenty (20) miles on each side of said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-west Territories and the Province of Manitoba; Provided, that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed to the Dominion Government

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(1) 8 App. Cas. 767; *ante* vol. 3, p. 1.

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[366] shall be made good to the Dominion from contiguous public lands ; and, provided further, that until the commencement within two years as aforesaid from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of one hundred thousand dollars per annum, in half-yearly payments in advance."

Subsequently the Legislature of British Columbia in order to give effect to the undertaking, set out in the eleventh section as above cited, passed the Act 43 Vict. c. 11, which contains the following provision :

" There is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway line located between Burrard Inlet and Yellow Head Summit, in trust, to be appropriated in such manner as the Dominion Government may deem advisable a similar extent of public lands," etc.

By the second section of the Act of British Columbia 47 Vict. c. 14 it was enacted as follows :

" From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of the said line, as provided in the Order in Council, section 11, admitting the Province of British Columbia into confederation."

The proviso at the end of this section cannot in any way affect the question under consideration.

By the third section of this last Act there was also granted to the Federal Government, in trust, to aid in the construction of the railway from Esquimalt to Nanaimo a certain tract of land therein described with this declaration :

" And including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder."

[367] The seventh section grants another tract in the terms following :

"There is hereby granted to the Dominion Government three and a half million acres of land in that portion of the Peace River District of British Columbia lying east of the Rocky Mountains and adjoining the North-West Territory of Canada to be located by the Dominion in one rectangular block."

This legislation was adopted by the Federal Government by the Act 47 Vict. c. 6. Section 11 of that Act provides for the management of the lands in that district along the line of the railway and section 12 for that of the lands in the Peace River District.

Laying aside the correspondence between the two governments on the question of the delays and difficulties that arose in carrying out the conditions of the eleventh section of the agreement, the foregoing are the main enactments to consult in order to define the character of the grant made by the Government of British Columbia to that of the Dominion.

British Columbia, when making the building of the Canadian Pacific Railway one of the main conditions of entry into confederation, made, as is usual in such cases, grants of land, in trust, to the Federal Government to ensure its construction. Now, although this condition is found in a treaty dealing with great political and governmental questions, it is none the less plain that the transaction so far as it affects the lands is nothing more than a grant of valuable property to ensure the building of the railway, and that such grant must be interpreted according to the terms on which this contract was based and unaffected by the other parts of this treaty which relate to the political arrangements between the two governments. It must not be inferred from these latter, as the learned counsel for the respondent contends, that the Statute of British Columbia, 47 Vict. c. 14, is substantially nothing more than a declaration that lands of which the Crown was then vested for the benefit of British Columbia were thenceforth to be vested in [368] the Crown for the benefit of the Federal government ; and that after the passing of that Act the interest of that government was to be as great as that of British Columbia had been. This is a

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mere inference wholly unsupported by any expression in the Statute itself. The terms therein found must receive their legal force and no more. The idea that one government was completely invested with all the rights of the other in the lands thereby granted is a pure assumption which is refuted by the very terms of the grant.

In the treaty itself, sect. 11, the undertaking is "to convey to Dominion Government, etc., etc., a similar extent of public lands," in the Act of 43 Vict. c. 11, "lands being *granted* to the Dominion for the purpose, etc., etc.," in the Act of British Columbia 47 Vict. c. 14 s. 2, "There is hereby granted to the Dominion Government, . . . in trust, etc., etc., to be appropriated as the Dominion Government may deem advisable, the *public lands* along the line of the railway before mentioned, etc., etc." In the 7th sec. of this last Act the expressions are, "There is hereby granted to the Dominion Government three and a half million acres of land, etc." In all the terms used in making the grant not a single one can be found conveying the idea that anything else was granted except the land itself. All the expressions are clear and precise, granting only one single thing the land, and leave no room for doubt. According to the established principle of English law that a grant of land does not involve a surrender of the royal prerogative as to mines, there has not in the present case been any grant of the mines. That rule must be applied to the interpretation of grants made by Statute, just as to those made in the ordinary course to subjects, for it is well settled that the royal prerogative is never affected by a Statute unless it is expressly mentioned. In all the [369] Statutes quoted, with one exception, and in all the official documents concerning this matter nothing can be found to support the pretension that the royal prerogative was intended to be or could be affected by the grant of the lands. Two incontrovertible rules are therefore opposed to the contention that the mines of precious metals are to be considered as having passed to the Federal Government—first, the rule that the grant of lands never conveys the prerogative right to mines; secondly, the rule that the prerogative can never be affected except by the express terms of a Statute. I have said that there is only one exception in the language of the different Statutes. This is to be found in sect. 3 of

47 Vict. c. 14 of British Columbia relating to the grant of land for the railway from Esquimalt to Nanaimo, as follows :

“And including all coal, coal oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.” If we could construe these words as sufficient to constitute a grant of the mines of gold and silver, that would shew at least that the Legislature recognised the difference and that when desirous of conveying them, it used language adequate for that purpose. This exception would confirm the rule that the ownership of the mines could only pass by such expressed surrender. But even in this case there has been no such surrender.

If we are to be allowed to refer to the correspondence which brought about a final settlement between the two governments, we shall be satisfied that the idea of claiming the mines of gold and silver is quite recent, and one which had no existence during the negotiations which took place about the different grants in question. The primary object was to get substantial assistance in the construction of the railway and for that reliance was placed on lands of ascertained value, and not on mines which are of speculative value. Moreover we find in the various documents quoted, that the question is always of lands *available for farming or other purposes*. In the letter of Mr. Trutch, the agent of the Federal Government, in his dealings with the government of British Columbia, the lands are always described as *available for farming or other valuable purposes*. This last qualification *or other valuable purposes* cannot embrace the gold mines since it is a principle that they can only be conveyed by express terms ; but the words *other valuable purposes* to which due force must be given, might doubtless embrace lands suitable for lumbering, coal mines and quarries, etc., and ranches, but not the mines of gold and silver. In the Act of 1883, c. 14, opening to settlement lands in Vancouver Island, a distinction is made between mining lands, coal and other minerals, and timber lands. These lands might also no doubt be embraced in the terms *other valuable purposes*. However this may be, there is not to be found in any of the legislative enactments on this subject, terms adequate to convey the royal prerogative in the mines of precious metals, much less do we find any which allow us to infer that the legislative and executive authority of British Columbia, in the districts in which are situated the lands granted, has passed to the Federal Govern-

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ment as a result of a transfer of interests purely material as was the subsidy to the Canadian Pacific Railway. To effect such a transfer of political power would require nothing short of an Imperial Act, altering the boundaries of British Columbia as described at the moment of her entry into confederation, and certainly no such Act exists.

Although the judgment in the Exchequer Court was delivered by myself, I am nevertheless of opinion that it should be reversed. I ought to say that by consent of all parties interested, that judgment was merely formal and given without argument so as to enable them to carry the case without delay to the Supreme Court

[371] HENRY, J. :—

This case has been presented to obtain the decision of this court as to the title to gold, deposits of silver and other precious metals in lands in British Columbia known as the twenty mile belt on each side of the Canadian Pacific Railway. In the case of *The Queen v. Farwell* (1) and in four other cases tried before me at Victoria in 1886, I decided that the title to the lands comprising the belt in question was not vested in her Majesty the Queen, and being still of that opinion I must necessarily decide that the deposits of gold, silver, and other precious metals are not vested in her Majesty for the use and benefit of Canada, but in her Majesty for the use and benefit of British Columbia. The case of *The Queen v. Farwell* (1) appealed from my judgment to this court has been argued, and is now pending for judgment. In the special case therein my judgment will be found, and I refer to it for my reasons and conclusions in that case which govern the decision of this

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I concur with Mr. Justice Gwynne.

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There can be no doubt that the right of Her Majesty to the precious metals does not depend upon her being seised of the lands in which they are found, her right to them whether they be in her own lands or in the land of a subject is by the same title, namely, by prerogative royal in right of her Crown, but such her title or the rule that the transfer of land, *eo nomine*, by grant from the Crown to a subject, does not transfer to the grantee any interest in the precious metals which may be in the land so granted, has not,

(1) 14 Can. S. C. R., 392.

in my opinion, any application in the determination of the question arising in the present case. What was the intention of the parties to the contract under consideration is the question before us, and that must be gathered from the nature of the transaction and of the [372] instruments in which the contract is contained and the circumstances under which and the parties between whom such instruments were framed.

By sect. 146 of the B. N. A. Act, it was enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's most honourable Privy Council on addresses from the Houses of the Parliament of Canada, and from the houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces or any of them into the union constituted by the Act the Dominion of Canada, on such terms and conditions as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of the B. N. A. Act, and that the provisions of any order in council in that behalf should have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland.

The effect of this enactment was, in my opinion, to constitute the Province of British Columbia, represented by its Legislative Council, an independent power to the extent of enabling it to negotiate a treaty with the Dominion of Canada, represented by the two Houses of the Parliament of Canada, as another independent power, and together to agree upon terms upon which the Province of British Columbia should be received into and become part of the Dominion of Canada, which treaty, if and when approved of and ratified by her Majesty in her Privy Council, should have the force and effect of an Act of the Imperial Parliament.

The transaction thus authorized being of the nature of a treaty between these two independent bodies, the Province of British Columbia represented by its Legislative Council on the one part [373] and the Dominion of Canada represented by the House of Commons and the Senate of Canada on the other; and her Majesty being in no wise concerned in it, save as ratifying and approving the terms of the treaty when agreed upon by and between the parties interested, the case must be regarded not at all in the light of a grant of land by the Crown to a subject, but in the light of a

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treaty between the two independent contracting parties upon the faith of which alone the province of British Columbia was received into and became part of the Dominion of Canada, and being given by the B. N. A. Act the force of an Act of parliament. The addresses of the Legislature of British Columbia and of the House of Commons and Senate of Canada respectively to her Majesty in pursuance of the above section of the B. N. A. Act show the proceedings taken by the province and the Dominion respectively for the purpose of negotiating a treaty of union.

The address of the Legislative Council of British Columbia is as follows:—

“ To the Queen’s most excellent majesty, most gracious Sovereign :

“ We, your Majesty’s most dutiful and loyal subjects, the members of the Legislative Council of British Columbia in Council assembled, humbly approach your Majesty for the purpose of representing that during the last session of the Legislative Council the subject of the admission of the colony of British Columbia into the union or Dominion of Canada was taken into consideration, and a resolution on the subject was agreed to embodying the terms upon which it was proposed that this colony should enter the union.

“ That after the close of the session delegates were sent by the government of this colony to Canada to confer with the government of the Dominion with respect to the admission of British Columbia into the union upon the terms proposed.

“ That after considerable discussion by the delegates with the members of the government of the Dominion of Canada the terms and conditions hereinafter specified were adopted by a committee of the Privy Council of Canada and were by them reported to the Governor-General for his approval,

“ That such terms were communicated to the government of this colony by the Governor-General of Canada in a despatch dated July [374] 7th, 1870, and are as follows :—

“ 1. Canada shall be liable for the debts and liabilities of British Columbia existing at the time of the union.”

The 2nd to the 10th paragraphs inclusive it is not necessary to set out.

“ 11. The government of the Dominion undertake to secure the commencement simultaneously within two years from the date of the union, of the construction of a railway from the Pacific towards

in my opinion, any application in the determination of the question arising in the present case. What was the intention of the parties to the contract under consideration is the question before us, and that must be gathered from the nature of the transaction and of the [372] instruments in which the contract is contained and the circumstances under which and the parties between whom such instruments were framed.

By sect. 146 of the B. N. A. Act, it was enacted that it should be lawful for the Queen, by and with the advice of Her Majesty's most honourable Privy Council on addresses from the Houses of the Parliament of Canada, and from the houses of the respective legislatures of the colonies or provinces of Newfoundland, Prince Edward Island and British Columbia, to admit those colonies or provinces or any of them into the union constituted by the Act the Dominion of Canada, on such terms and conditions as are in the addresses expressed, and as the Queen thinks fit to approve, subject to the provisions of the B. N. A. Act, and that the provisions of any order in council in that behalf should have effect as if they had been enacted by the parliament of the United Kingdom of Great Britain and Ireland.

The effect of this enactment was, in my opinion, to constitute the Province of British Columbia, represented by its Legislative Council, an independent power to the extent of enabling it to negotiate a treaty with the Dominion of Canada, represented by the two Houses of the Parliament of Canada, as another independent power, and together to agree upon terms upon which the Province of British Columbia should be received into and become part of the Dominion of Canada, which treaty, if and when approved of and ratified by her Majesty in her Privy Council, should have the force and effect of an Act of the Imperial Parliament.

The transaction thus authorized being of the nature of a treaty between these two independent bodies, the Province of British Columbia represented by its Legislative Council on the one part [373] and the Dominion of Canada represented by the House of Commons and the Senate of Canada on the other; and her Majesty being in no wise concerned in it, save as ratifying and approving the terms of the treaty when agreed upon by and between the parties interested, the case must be regarded not at all in the light of a grant of land by the Crown to a subject, but in the light of a

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pleased by and with the advice of your Majesty's most honourable Privy Council under the provisions of the 146th section of the British North America Act, 1867, to admit British Columbia into the union or Dominion of Canada on the basis of the terms and conditions offered to this colony by the government of the Dominion of Canada hereinbefore set forth."

Similar addresses having been presented to Her Majesty from the House of Commons and the Senate of Canada, Her Majesty was pleased by an order in council at the court at Windsor, dated the 16th May, 1871, to approve of the said terms and conditions, and it was thereby ordered and declared by Her Majesty by and with the advice of her Privy Council, that from and after the 20th day of July, 1871, the said colony of British Columbia should be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in the said addresses, copies of which are annexed to the said order in council.

This language of the 11th article of the treaty with reference to the transfer from British Columbia to the Dominion of Canada of this tract of land never could be literally complied with, that is to say that by no species of conveyance could the land be conveyed to the Dominion government as grantees thereof. That government, from the nature of the constitution of the Dominion, could not take lands by grant or otherwise, nor could it have the power of appropriation of the tract in question, otherwise than under the direction and control of the parliament of Canada. When therefore, as part of the terms upon which British Columbia was received into the Dominion, it was agreed that a tract of the public lands of the Province of British Columbia should be conveyed in such manner as to be subjected to being appropriated as the Dominion government may deem advisable, what was intended plainly was, as it appears [376] to me, that the beneficial interest which the province had in the particular tract of land as part of the public domain of the province should be divested, and that the tract, although still remaining within the Province of British Columbia, should be placed under the control of the Dominion parliament as part of the public property of the Dominion for the purpose of being appropriated by the Dominion government, in such manner as that government should deem advisable in furtherance of the construction of the railway which that government had undertaken to construct, subject, however, to a payment for ever by the Dominion to the Provincial government of \$100,000 per annum by half-yearly payments in advance. That this was the view entertained by the Dominion government and parliament as to this provision of the treaty of

union entered into by them with the Province of British Columbia is apparent from an Act of the parliament of Canada passed in 1875, 38 Vict. c. 51, of the passing of which Act the Province of British Columbia must have become aware, by which it was enacted that the Dominion Land Acts of 1872 and 1874 and the several provisions thereof should be, and were thereby extended, and should apply to all lands to which the government of Canada were then, or should at any time become entitled, or which were or should be subject to the disposal of Parliament, in the Province of British Columbia.

It is now contended on the part of British Columbia that the 11th article of the treaty of union does not cover, and was not intended to cover, the precious metals in the tract of land in question ; and this contention is based wholly upon the rule applied to a grant of land, *eo nomine*, by the Crown to a subject, that under such a grant the precious metals do not pass. That rule, as I have already said, has not, in my opinion, any application to a contract of the nature [377] of the treaty under consideration made between two independent powers of such constitutional character as are the Province of British Columbia and the Dominion of Canada. The question here is not between the Crown and a subject, so that no question arises as to the prerogative rights of the Crown. Indeed, if such a narrow construction should be put upon this treaty upon the faith of which British Columbia was received into the union, the chief benefit expected to accrue to the Dominion under the clause under consideration would be disappointed for as the Canada Pacific Railway through almost its whole extent within the Province of British Columbia passes through and across the two ranges of the Rocky Mountains, the lands on either side of which, except when the railway lies in the valleys of the mountain streams, are wholly unsuitable for agricultural purposes, and have little or no value other than that which consists in the precious metals which are believed to abound in them ; if those metals should be regarded as excepted from the operation of the treaty, the exception would effectually deprive the Dominion government of all benefit from the tract of land so declared to have been intended to be subjected to appropriation in such manner as the Dominion government should deem advisable, and would make the 11th article of the treaty in so far as the Dominion in this tract is concerned quite illusory.

The contention of British Columbia is that the precious metals in the tract of land referred to in the 11th article are the property of the province, notwithstanding the treaty and that the search for them and all things relating to the prospecting for, and the opening and working of the mines are to be governed by the laws of British

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Columbia relating to gold mining, and for the benefit of the Provincial Government. It will be convenient here to refer to those laws for the purpose of seeing what benefit from the tract in question [378] would remain to be enjoyed by the Dominion after the exercise by the Provincial Government of the powers vested in them by the laws relating to gold mining if the precious metals in the tract in question be reserved as the property of the province.

By an Act of the Provincial Legislature passed in 1867 to amend the law relating to gold mining, it is enacted: That the governor of the province may from time to time appoint such persons as he should think proper to be chief gold commissioner and gold commissioners either for the whole province or any particular districts therein. That every gold commissioner upon payment of the sums in the Act mentioned to the use of the province should deliver to any person over the age of sixteen years applying for the same a certificate to be called a free miner's certificate, entitling the person to whom it is given to all the rights and privileges by the Act conferred on free miners. That such free miners certificate shall, at the request of the applicant be granted, and continue in force for one year or three years from the date thereof upon payment by such applicant to the use of the province of the sum of \$5 for one year and \$15 for three years. That every free miner shall during the continuance of his certificate have the right to enter upon any of the waste lands of the Crown not for the time being occupied by any other person; but in the event of such entry being made on lands already lawfully occupied for other than mining purposes, previous to entry full compensation shall be made to the occupant or owner for any loss or damage he may sustain by reason of any such entry, such compensation to be determined by the nearest stipendiary magistrate or gold commissioner with or without a jury of not less than five.

That no person shall be recognised as having any right or interest [379] in, or to any mining claim or ditch or any of the gold therein unless he shall be, or in case of disputed ownership unless he shall have been at the time of the dispute arising, a free miner.

That all claims must be accorded annually, but any free miner shall upon application be entitled to record his claim for a period of two or more years upon payment of the sum of two dollars and fifty cents for each year included in such record. That the interest which a miner has in a claim shall be deemed to be a chattel interest equivalent to a lease for such period, as the same may have been recorded renewable at the end thereof.

That it shall be lawful for the gold commissioner upon being so requested to mark out for business purposes or gardens, on or near

any mining ground, a plot of ground of such size as he shall deem advisable subject, however, to all the existing rights of free miners, then lawfully holding such mining ground, and any buildings erected or improvements made thereon for any such purpose, shall in every such case be erected and made at the risk of the person erecting and making the same; and they shall not be entitled to any compensation for damage done thereto by such free miners so entitled in working their claims bona fide.

That it shall also be lawful for the gold commissioner upon being so requested, to mark out for business purposes or gardens, on or near any mining ground, not previously pre-empted a plot of land of such size as he shall deem advisable to be held, subject to all the rights of free miners to enter upon and use such lands for mining purposes upon reasonable notice to quit being given to the occupier, such notice to be subject to the approval of the gold commissioner; and further upon due compensation for any crops thereon, and for the buildings and improvements erected on such plots, such compensation to be assessed by the gold commissioner [350] previous to entry, with or without a jury of not less than three; and that a monthly rent of \$5 shall in every such case be payable by the grantees of such plot or their assigns to the gold commissioners.

That every registered free miner shall be entitled to the use of so much of the water naturally flowing through or past his claim, and not already lawfully appropriated, as shall, in the opinion of the gold commissioner, be necessary for the due working thereof. That the size of claims should be as follows: For "Bar Diggings," a strip of land one hundred feet wide at high water mark and, thence, extending into the river to its lowest water level.

For "Dry Diggings" one hundred feet square. "Creek Claims" one hundred feet long measured in the direction of the general course of the stream and extending in width from base to base of the hill on each side. Where the bed of the stream or valley is more than three hundred feet in width, each claim shall be only fifty feet in length, extending six hundred feet in width; when the valley is not one hundred feet wide the claims shall be one hundred feet square.

"Bench Claims" shall be one hundred feet square.

The gold commissioner shall have authority in cases where benches are narrow to mark the claims in such manner as he shall think fit, so as to include an adequate claim.

Every claim situated on the face of any hill and fronting on any natural stream or ravine shall have a base line or frontage of one

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hundred feet, drawn parallel to the main direction thereof. Parallel lines drawn from each end of the base line, at right angles thereto, and running to the summit of the hill, shall constitute the side lines thereof. The whole area included within such boundary lines shall form a "*Hill Claim*."

For the more convenient working of back claims, or benches, [381] or slopes, it was enacted that the gold commissioner may,

upon application made to him, permit the owners thereof to drive a tunnel through the claim fronting on any creek, ravine or water course and impose such terms and conditions upon all parties as shall seem to him expedient. It was further enacted that "*Quartz*

Claims" should be one hundred and fifty feet in length, measured along the lode or vein, with power to follow the lode or vein and its spurs, dips and angles anywhere on or below the surface included between the two extremities of such length of one hundred and fifty feet but not to advance upon or beneath the surface of the earth more than one hundred feet in a lateral direction from the main lode or vein along which the claim is to be measured.

That it should be lawful for the gold commissioner upon the application thereafter mentioned to grant to any bed rock flume company for any term not exceeding five years, exclusive rights of way through and entry upon any mining ground in his district for the purpose of constructing, laying and maintaining bed rock flumes.

That such companies upon obtaining such grant, for which they should pay \$125 into the colonial treasury should be entitled, among others, to the following rights and privileges. The rights of way

through and entry upon any new and unworked river, creek, gulch or ravine, and the exclusive right to locate and work a strip of ground one hundred feet wide and two hundred feet long in the bed thereof to each individual of the company also. The rights of

way through and entry upon any river, creek, gulch, or ravine worked by miners for any period longer than two years prior to such entry, and already wholly or partially abandoned, and the exclusive rights to stake out and work both the unworked and abandoned portions thereof one hundred feet in width, and one-quarter of a mile in length. Also the use and enjoyment of so

much of the unoccupied and unappropriated water of the stream [382] on which they may be located, and of other adjacent streams as may be necessary for the use of their flumes, hydraulic power and machinery, to carry on their mining operations, and

they shall have their right of way for ditches and flumes to convey the necessary water to their works, they being liable to other parties for any damage which may arise from running such ditch or flumes through or over their ground, and they shall have a right to all the gold in their flumes. And, further, it was enacted that all bed rock flume companies should register their grant when obtained, and that a registration fee of \$25 (twenty-five dollars) should be charged therefor, and that they should also pay an annual rent of \$12.50 (twelve dollars and fifty cents) for each quarter of a mile of right of way legally held by such company. It was further enacted that leases for a term of ten years might be granted upon payment of the sum of \$125 (one hundred and twenty-five dollars) into the colonial treasury for the quantities of land following, that is to say :—

In Dry Diggings, ten acres.

In Bar Diggings unworked half a mile in length along the high water mark.

In Bar Diggings worked and abandoned one mile and a half in length along the high water mark.

In Quartz Reefs unworked half a mile in length.

In Quartz Reefs worked and abandoned one mile and a half in length with liberty in the two last cases to follow the spurs, dips and angles on and within the surface for two hundred feet on each side of the main lead or seam.

Now from the conformation of the country through which, within the Province of British Columbia, the Canadian Pacific Railway must necessarily have been located it may be confidently affirmed that the tract of land on either side of it intended by the treaty [383] of union to be appropriated by the Dominion Government, as they should deem advisable, had no appreciable value except such as might consist in the precious metals which might be found therein, and that the above gold mining regulations of the Province of British Columbia would, if they apply to the above tract, absorb the whole of so much of the tract as did not consist of inaccessible mountain ranges of naked rock. The chief value, even, of the valleys through which the mountain streams flow consists, or is deemed to consist, of the gold found therein, and it is no doubt because of the gold that is therein that the above mining regulations give to the miner what may be said to be almost absolute

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vided in the order in council, section 11, admitting the Province of British Columbia into confederation. The land intended to be hereby conveyed is more particularly described in a despatch to the Lieutenant Governor from the Honourable the Secretary of State, dated the 31st day of May 1878, as a tract of land lying along the line of said railway, beginning at English Bay or Burrard Inlet and following the Frazer River to Lytton.; thence by the valley of the River Thompson to Kamloops; thence up the valley of the North Thompson, passing near to Lakes Albreda and Cranberry, to Tête Jaune Cache; thence up the valley of the Fraser River to the summit of Yellow Head, or boundary between British Columbia and the North West Territories, and is also defined on a plan accompanying a further despatch to the Lieutenant Governor from the Secretary of State, dated the 23rd of September, 1878. The grant of the said land shall be subject otherwise to the conditions contained in the said 11th section of the terms of union.

“2. This Act shall not affect or prejudice the rights of the public with respect to common and public highways existing at the date hereof within the limits of the lands hereby intended to be conveyed.

“3. This Act may be cited as ‘An Act to grant public lands on the main land to the Dominion in aid of the Canadian Pacific Railway, 1880.’”

Now, it is to be observed that this Act, as, indeed upon its face appears, was passed for the purpose of effectually fulfilling the terms of the 11th article of the treaty of union, it must therefore be construed in the light of the treaty, and not in the light of the narrow rule applicable to the case of a grant of land by the Crown to a subject.

The Legislature of British Columbia in passing the Act, must, as it appears to me, be held to have intended to divest itself of all control over the tract or belt described in the Act as public property of the province, and to have placed it under the control of [386] the Dominion parliament as public property of the Dominion and thus to give effect to the condition upon which British Columbia was received into the union, although the tract being within the limits of the province, (where granted by the Dominion government to individuals like all other lands vested in individuals) will be subject to the laws of the province affecting the estate granted to such individuals as to local taxation, etc.

Title to any part of the land within the described belt can only be acquired by individuals under and in virtue of a grant from the Dominion authorities, that is to say by a crown grant executed

under and in pursuance of the authority of the laws of the Dominion affecting Dominion lands ; if, therefore, the rule as to crown grants of land not passing the precious metals unless they be specifically named therein is to have any application in the present case, it seems to me that as the power to grant the lands to individuals is transferred from the province to the Dominion unrestricted by any qualification as to the precious metals, it must be intended that the Dominion authorities should have power to grant them in such manner as the authorities having control of the Dominion lands should think fit, and that therefore in a grant of the land or of any part thereof they might specifically grant also the precious metals therein by using appropriate language for that purpose, and if they could do so, then the rule as to the precious metals not passing if appropriate language should not be used would enure to the benefit of the Dominion and not to that of the province. The power to pass title to the land by grant from the crown being acknowledged to be in the Dominion authorities, all the incidents to that power must be in the Dominion also in the absence of any express qualification of the power contained in the [387] instrument, in this case the treaty, vesting the power in the Dominion.

Subsequently to the passing of this Act, some delay took place in the construction of the railway, occasioned partly by reason of a contemplated change in the manner of constructing the railway, that is to say, through the means of a company to be incorporated for the purpose, instead of by the government, as a government work, in which manner it was being constructed in 1878, and partly by reason of searching for a better line through the Rocky Mountains than that which had been located in 1878.

In 1881 an Act was passed entitled an Act respecting the Canadian Pacific Railway, incorporating a company to construct and work it when constructed. By this Act the railway was divided into three sections, the eastern, the central and the western—the central extending from Selkirk on the east side of the Red River in Manitoba to Kamloops in the Rocky Mountains, and the western extending from Kamloops to Port Moody on Burrard Inlet ; the Dominion government undertook the completion of this western section. The search for a better line through the Rocky Mountains to Kamloops than that which had been located in 1878 occupied some time, and while this search was still in progress, an Act was passed by the Dominion parliament

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in the month of May, 1882, whereby it was enacted that the Canadian Pacific Railway Company might, subject to the approval of the Governor in Council, lay out and locate their main line of railway from Selkirk to the junction in the western section at Kamloops by way of some pass other than the Yellow Head Pass.

Difficulties also had arisen between the Dominion and the Provincial governments in relation to the construction of a railway and graving dock on Vancouver island, and other matters. At length [888] in the month of February, 1888, the Provincial government in a paper addressed by them to the Dominion government, setting forth the view taken by the Provincial government of the various matters therein stated in relation to the railway and graving dock on Vancouver Island, made a proposition as a basis to lead to a final settlement between the two governments as well in relation to the delay in the construction of the railway as in relation to the said other matters, which proposition is as follows:—

“That the Dominion government be urgently requested to carry out its obligation to the province either by commencing at the earliest possible period the construction of the island railway and completing the same with all possible despatch, or by giving to the province such fair compensation for failure to build such island railway as will enable the government of the province to build it as a provincial work and open the east coast lands for settlement; and that the Dominion government be earnestly requested to take over the graving dock at Esquimalt upon such terms as shall recoup and relieve the province of all expense in respect thereof, and to complete and operate it as a federal work, or as a joint Imperial and Dominion work; and that in lieu of any expensive and dilatory method of ascertaining the exact acreage of lands alienated within the railway belt and otherwise rendered unavailable, there be set apart for the use of the Dominion, a tract of 2,000,000 acres of land in extent, to be taken up in blocks of not less than 500,000 acres in such localities on the main land as may be agreed upon, the land to be taken up and defined within two years, and that it be one of the conditions that the Dominion government in dealing with lands in this province shall establish a land system equally as liberal both as to mining and agricultural industries as that in force in this province at the present time, and that no delay take place in throwing open the land for settlement.”

This last clause clearly shows that up to this present time the idea has not been conceived that the precious metals were not intended to pass under the provisions of the 11th article of the treaty of union. It shows also that the provincial government's understanding of that article was that the lands in British Columbia, which by that article were agreed to be transferred to, and placed [389] under the control of, the Dominion authorities, should be under such control for all purposes, mining as well as agricultural.

In the summer of 1883 Sir Alex. Campbell, then Minister of Justice, was sent by the Dominion government to British Columbia with instructions to negotiate a settlement of all existing differences, and to procure a change in the lands to be transferred by the province to the dominion between Kamloops and the eastern limit of the province rendered necessary by the contemplated change in the location of the line through the mountains east of Kamloops. The provincial authorities and Sir Alex. Campbell agreed upon terms of settlement, which were embodied in an agreement which contained a clause that the terms agreed upon should be taken by the province in full of all claims of the province against the Dominion in respect of delays in the commencement and construction of the Canadian Pacific Railway, and in respect of the non-construction of the Esquimalt and Nanaimo railway, and should be taken by the Dominion government in satisfaction of all claims for additional lands under the terms of union, but should not be binding unless and until the same should be ratified by the parliament of Canada and the legislature of British Columbia. In the month of December, 1883, the legislature of British Columbia accordingly passed an Act in which after setting out the agreement at large they ratified it and enacted that (1) :

These sections comprised the whole of the Act which relates to the lands agreed to be given to the Dominion government by the 11th article of the treaty of union ; the three and one-half million of acres in the Peace River district being given in satisfaction of all claims of the Dominion for additional lands in substitution for such [390] lands within the limits of the railway belt as might be held under pre-emption right or crown grant as provided by the said 11th article of the treaty. The residue of the Act relates wholly to giving effect to the agreement made between Sir Alexander Camp-

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(1) See the Act *ante* p. 257.

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bell and the provincial government in respect of the Vancouver Island railway and the graving dock, and has no bearing whatever upon the subject under consideration. It was argued, however, that in the clause which appropriates certain lands in aid of the construction of this railway, the words "including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder," being inserted, and nothing being mentioned in the clause relating to the Canadian Pacific railway belt but "public lands along the line of the railway wherever it may be finally located, etc.," it must be inferred that mines and minerals were not intended to pass under the latter designation. But it is quite an accidental circumstance that the two matters are referred to in the same Act. It is by the treaty of union and not by anything contained in this Act that the extent of interest in the public lands within the limits of the railway belt intended by the treaty of union to be placed under the control and administration of the Dominion government and parliament is to be determined; whereas the interest in the lands appropriated in aid of the construction of the island railway, the beneficial interest in which lands was to be vested in the company to be incorporated to construct the railway, is determined by this Act, which adopts the language of the Act No. 15, of 1882, referred to in the agreement with Sir Alexander Campbell, whereby like provision was made in the interest of the company thereby incorporated. The Dominion government having no beneficial interest whatever in the [391] lands so appropriated, were naturally indifferent to the language used by the provincial authorities in making the appropriation, and they cannot be prejudiced in their title to the lands within the railway belt in which they are beneficially interested by the language used in making the appropriation of lands in which they have no beneficial interest. From the provision, therefore, made in the interest of the company which should construct the island railway, no inference can be drawn to qualify the extent of the interest of the Dominion of Canada, under the treaty of union, in the Canadian Pacific railway belt, any more than such an inference can be drawn from like language used in a grant of land from the Crown to a subject. The intention of the parties to the treaty of union is alone what must govern; and that the intention of both parties to that treaty was that the precious metals should pass to

the Dominion in the sense of being under the absolute administration and control of and for the exclusive benefit of the Dominion authorities appears 'o me to be clear for the reasons already given.

The Dominion parliament by the Act 47 Vict. c. 6, has enacted :—

Sect. 11. That “ the lands granted to Her Majesty represented by the government of Canada in pursuance of the 11th section of terms of the union by the Act of the legislature of the Province of British Columbia, number eleven of one thousand eight hundred and eighty. . as amended by the Act of the said legislature, assented to on the 19th day of December, 1883. . shall be placed upon the market at the earliest date possible and shall be offered for sale on liberal terms to actual settlers.

“ 2. The said lands shall be open for entry to *bona fide* settlers in such lots and at such prices as the Governor in Council may determine.

“ 3. Every person who has squatted on any of the said lands prior to the 19th day of December, 1883, and who has made substantial improvements thereon shall have a prior right of purchasing the lands so improved at the rates charged to settlers generally.

“ 4. The Governor in Council may from time to time regulate the [392] manner in which, and terms and conditions upon which, the said lands shall be surveyed, laid out, administered, dealt with and disposed of, provided that regulations respecting the sale, leasing or other disposition of such lands shall not come into force until they are published in the *Canada Gazette*.”

By the 12th section it is enacted that the three and one-half million acres of lands in the Peace River district in British Columbia granted to Her Majesty as represented by the government of Canada by the said Act assented to on the 19th day of December, 1883, shall be held to be Dominion lands within the meaning of the Dominion Lands Act, 1883.

In placing these lands in this manner by the Dominion parliament under the administration and control of the Dominion government as Dominion lands, the parliament has, in my opinion, acted in perfect accordance with the letter and spirit, true intent and meaning of the 11th article of the treaty of union and the question therefore submitted in the case must be answered in favour of the affirmant, the Attorney-General of Canada, and the appeal must be dismissed with costs.

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SUPREME COURT OF CANADA.

THE ATTORNEY GENERAL OF CANADA v. FLINT.

On appeal from the Supreme Court of Nova Scotia.

[Reported 16 Can. S. C. R. 707.]

Imperial Court in Canada—Conferring jurisdiction on—Inland Revenue Act, 31 V. c. 8, s. 156.

Held, (reversing the judgment of the Supreme Court of Nova Scotia) that the Dominion Parliament has power to confer additional jurisdiction on the Court of Vice-Admiralty at Halifax, although that court was created by an Imperial Act.

Appeal from a judgment of the Supreme Court of Nova Scotia (1) directing a writ of prohibition to issue against the Court of Vice-Admiralty at Halifax, prohibiting such court from exercising jurisdiction in the matter of a plaint instituted in the Court of Vice-Admiralty of Halifax, between the Attorney-General of Canada and Joseph Flint, Oswald Hornsby, James Philip Flavin and Ronald McDonald.

The facts of the case are fully stated in the following judgments.

Sedgewick, Q.C., and *Burbidge, Q.C.*, (Deputy Minister of Justice), for the appellant.

No counsel appeared for the respondent.

RITCHIE C. J. :—

Proceedings were taken in the Vice-Admiralty Court at Halifax, Nova Scotia, on an information of Her Majesty's Attorney-General of Canada on behalf of Her Majesty against the defendant to enforce the payment of

**Present* :—RITCHIE C.J. and STRONG, FOURNIER, HENRY and GWINNE JJ.

(1) 3 Russell & Geldert, 453; *post* p. 297.

penalties for breaches of the Inland Revenue Act, and particularly of sects. 127, 128, 130, 137 of said Act.

To the monition issued the defendant Flint appeared under protest and alleged that the court had no jurisdiction in the premises.

The Vice-Admiralty Court held that it had jurisdiction, [708] whereupon defendant Flint applied to the Supreme Court at Halifax for an order for a writ of prohibition to stay further proceedings in the Vice-Admiralty Court, and the Supreme Court ordered "that a writ of prohibition do forthwith issue out of this court, directed to the Honourable James McDonald, Judge and Commissary of the Vice-Admiralty Court at Halifax," to prohibit the said court from further proceeding in the said plaint or action against the said Joseph Flint.

From this order the Attorney-General of Canada has appealed to this court.

It appears from the judgment of the Vice-Admiralty Court that "in May, 1879, as appears by the affidavit on which the monition was issued on the 21st May last, the machinery and apparatus for the illegal distilling of spirits were seized on the premises in Halifax, owned and occupied by Flint, and on his information against McDonald, Hornsby and Flavin, as concerned therein, a large quantity of spirits, mash and apparatus for distilling were seized on the premises occupied by the two latter. No claim having been made by either party pursuant to the Dominion Inland Revenue Act of 1867, 31 Vict. c. 8. all the goods so seized were condemned under the 163rd section, and the present action was brought against the four defendants for the penalties imposed by this Act. Three of them have not appeared—Hornsby and Flavin, not having been served—but Flint appeared on the 2nd

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inst., under protest, denying the jurisdiction of this court; on which the Crown, by the Attorney-General, has taken issue, and the case has been argued before me at the instance of both parties, though the question, strictly speaking, should have been raised by plea."

The penalties sought to be recovered were : under sect. 127 for exercising a business subject to excise, without license ; under sect. 128 the additional penalty ; under sect. 130 the penalty for having in his possession apparatus for carrying on a business subject to excise without having made a return thereof ; and under sect. 137 for not making proper returns of premises, etc.

The 156th section of the Act respecting the Inland Revenue provides :—

" 156. All penalties and forfeitures incurred under this Act or any other law relating to excise may be prosecuted, sued for and recovered in the Superior Courts of Law or Court of Vice-Admiralty having jurisdiction in that province in Canada where the cause of prosecution arises or wherein the defendant is served with process," etc.

The parliament of Canada has the sole exclusive power to legislate on the subject of the inland revenue of the Dominion, and in the exercise of that power the unquestioned right to impose the penalties prescribed by sects. 127, 128, 130 and 137 before referred to, and declare [709] how and in what courts in the Dominion such penalties may be prosecuted, sued for and recovered, and in selecting the Court of Vice-Admiralty as having jurisdiction in the Province of Nova Scotia, where the cause of prosecution arises, and where the defendant is served with process, the parliament of Canada in no way exceeded its exclusive legislative power. The principles which are entirely applicable to and must govern the

case have been so fully discussed in the case of *Valin v. Langlois* in this court (1), and in the Privy Council (2), that it is unnecessary to discuss them now. The fact of the Admiralty Court exercising jurisdiction in the Dominion being an Imperial Court in no way, in my opinion, interferes with the application of the principles enunciated in *Valin v. Langlois* (2) or with the conclusion arrived at in that case.

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Whether, as has been suggested, the Dominion parliament could compel the Vice-Admiralty Court to assume or the judge thereof to act on, the jurisdiction conferred is a point it will be quite time enough to determine when such question arises. It is clear in this case the Imperial Government has not intervened, and the judge of the Vice-Admiralty has assumed and acted on the jurisdiction, as I cannot doubt will always be the case when his judicial services are invoked.

The appeal should be allowed with costs.

STRONG J :—

By sect. 156 of the Inland Revenue Act, 31 Vict. c. 8, parliament has conferred jurisdiction to entertain suits and prosecutions for the recovery of penalties and forfeitures imposed by the Act on the Superior Courts of Law (meaning of course the Superior Courts of the Provinces) and the Court of Vice-Admiralty. Since the decision of this court in *Valin v. Langlois* (1), and the delivery of the judgment of the Privy Council in the same (2), it cannot be denied that this enactment was within the legislative powers given to parliament by the British North America Act of 1867. The Lord Chancellor, in delivering the judgment of the Privy Council, expressly

(1) 3 Can. S. C. R. 1; ante vol. 1, p. 167.

(2) 5 App. Cas. 115; ante vol. 1, p. 158.

plied on assignment, executed on the debtor's own volition, or on the urgency or pressure of his creditors.

If we hold this Act not to be within the prohibited subjects because it only provides for one way of bringing it into operation, and omits all compulsory applications, then the legislature could pass another Act providing for its compulsory operation on acts done or suffered by the debtor, which Act would be upheld on the same line of argument urged to support the present Act. If the forbidden ground be invaded to any partial extent by one enactment and to another, or to the remaining extent by another, the law must be held to be violated.

[182] By our Creditors' Relief Act of 1880, if a debtor leave an unsatisfied execution in the sheriff's hands for a named time, all his creditors may file claims which on proof as directed, are to have the force of judgments and executions, and entitled the creditor to share as an execution creditor both in the property seized and all future seizures which the sheriff may make, so long as there are claims filed to be satisfied, and all priority in executions is abolished, and may obtain attaching orders against all debtors to the execution debtors, etc.; all the debtor's realty and personalty in the county may be thus reached.

This Act in effect makes the debtor suffering an execution to remain unsatisfied, liable to have the whole of his estate at once applied to pay equally all his creditors who bring in claims.

I wish to be distinctly understood as expressing no opinion as to the legality of any statute except that before us. I necessarily refer to it as arguments were addressed to us, as to the incompleteness of these Acts as insolvent Acts, and to illustrate my view as to how by piecemeal (as it were) legislation can thus, in substance

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except that of the Imperial Parliament. If, however, the judge of a Vice-Admiralty Court thinks fit to exercise the jurisdiction conferred by a statute of the Dominion, I see no ground for making any distinction between the case of such a court and that of provincial courts, as to which *Valin v. Langlois* (1), as I understand the judgment of the Privy Council, has decisively determined that jurisdiction so conferred may be lawfully assumed.

For this reason I am of opinion that the writ of prohibition should be quashed and the rule nisi in the court below discharged.

[Translated].

FOURNIER, J :—

The only question arising for determination in this case is whether the Court of Vice-Admiralty has jurisdiction in actions for breaches of the provisions of the law relating to the inland revenue. This jurisdiction is conferred on it in these terms by sect. 156 of 31 Vict. c. 8 :

“ All penalties and forfeitures incurred under this Act, or any other law relating to excise may be prosecuted, sued for and recovered in the . . . Court of Vice-Admiralty, having jurisdiction in that province in Canada, where the cause of prosecution arises, or wherein the defendant is served with process.”

This enactment has been declared illegal by the Supreme Court of Nova Scotia, as being an excess of jurisdiction on the part of the federal parliament, and an order has, in consequence, been directed to the Court of Vice-Admiralty to restrain it from exercising the jurisdiction conferred by the section above cited. This judgment is evidently erroneous, first as contrary to the principle hitherto undisputed, that all courts are open to the Crown in the prosecution of its rights.

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(1) 5 App. Cas. 115 ; *ante* vol. 1, p. 158.

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“ Though his subjects are, in many instances, under the necessity of suing in particular courts, the King has the undoubted privilege of suing in any Court he pleases.” Chitty on Prerogative (1) ; Bacon’s Abridgment (2) ; *Attorney-General v. Mayor of Galway* (3).

This doctrine, supported by numerous authorities, has been upheld by the judgment of Blake, V.C., in the case of *Attorney-General v. Walker* (4).

These authorities shew clearly that this judgment is opposed to the well recognized principle that Her Majesty has the privilege of choosing any tribunal she pleases for the prosecution of her rights.

It is also erroneous in that it declares that the federal parliament had not the power of conferring on the Court of Vice-Admiralty the jurisdiction which has been assigned to it by section 156 already cited. With the difference that the Court of Vice-Admiralty is established by the Imperial authorities, this is the same question as that which has already been raised in several cases regarding the power of the federal parliament, to impose, by its laws, new duties on provincial tribunals. As regards these courts, the question has been settled by the decision of the Privy Council in the case of *Valin v. Langlois* (5).

But in this case, the question arising with regard to the Court of Vice-Admiralty which derives its jurisdiction from the Imperial Parliament, are the same reasons available for the purpose of reaching the same conclusion as in the case of *Valin v. Langlois* (5). On the subjects coming under its jurisdiction, the power of the federal parliament is supreme, and extends over all residents of the Dominion. The laws concerning inland revenue

(1) Page 244.

(3) 1 Molloy, 95.

(2) Title “ Prerogative,” p. 472. (4) 25 Grant, 233.

(5) 5 App. Cas. 115 ; ante vol. 1, p. 158.

being unquestionably, one of the subjects over which it has exclusive jurisdiction, ought not their provisions to be binding even for the Court of Vice-Admiralty? This court is of Imperial creation, but exercising its jurisdiction throughout the province of Nova Scotia is it not relatively to the Dominion in a position similar to that of the Supreme Court of this province? Does not each of these courts owe its existence to a power which in matters within its competence such as the constitution of the provincial tribunals is independent of the federal parliament? The right of conferring new powers on the Supreme Court has been recognised however, as regards this latter although it is peculiarly under the control of the local government. Why could not the federal parliament [712] exercise the same power with respect to the Court of Vice-Admiralty? Since there is a complete analogy in the position of the two courts, should not the reasoning which prevailed in *Valin v. Langlois* (1), cause us to adopt the same conclusions?

In support of this opinion the reasoning of Dorion C.J., in the case of *Bruneau v. Massue* (2) may also be adopted: "Judges as citizens were bound to perform all the duties imposed upon them by either the Dominion or Local Legislature."

Should not the judge of the Court of Vice-Admiralty, who is at the same time the Chief Justice of Nova Scotia, consider himself as bound to execute the duties imposed on him by this law of the Dominion, especially when there is not only no provision of the Imperial laws on the subject of Admiralty Courts opposed thereto, but on the contrary there are some of them which admit the existence of colonial legislation on this subject on condition that it is not repugnant to the former.

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(1) 5 App. Cas. 115; *ante* vol. 1, p. 158.

(2) 23 L. C. Jurist 60.

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Indeed the Imperial Act 28 & 29 Vict., c. 63, (1865) recognises this right in the following terms :—

“ Any colonial law which is, or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.”

Does not this enactment, which applies as well to future as to then existing legislation, recognise positively in the colonial authorities the power of adding to the provisions of the Imperial laws ? Does it not also declare that such enactments should receive their effect on the sole condition of not being inconsistent with the Imperial laws ? To the enumeration of the powers contained in the Imperial Act of 1868, the federal parliament has added another subject of jurisdiction by adopting sect. 156. But this provision not coming in conflict with any of those of the Imperial Act and neither altering nor modifying any of them, ought in virtue of the provision above cited of 28 & 29 Vict., c. 63, to be deemed as within the competence of the federal parliament.

Appeal allowed.

HENRY, J.—

I concur in the view which has just been expressed and for the same reason. It is clearly understood by the judgment in *Valin v. Langlois* (1) that the Parliament [713] of Canada has the power of conferring jurisdiction upon the judges of the Supreme Courts and other higher

(1) 5 App Cas 115 ; ante vol 1, p. 158.

courts of the several provinces. The same principle would apply to any court that sits within the Dominion. Although the Vice-Admiralty Court is established by the authority of England, still I see nothing to prevent the Parliament of Canada, inasmuch as that court sits within the jurisdiction of that parliament, to give it power and authority to try inland revenue cases, or cases connected with the customs. I would say, however, I do not think that court could be obliged to perform such duty, and that it is a court that could very well wrap itself up in its authority and say, "our other duties prevent us from assuming the functions assigned to us by the Parliament of Canada," but it is ready to adopt the duty, and I see no reason why the Parliament of Canada should not have the power to impose it. I think, therefore, the appeal should be allowed with costs.

GWYNNE, J., was also of opinion that the appeal should be allowed.

JUDGMENTS IN SUPREME COURT OF NOVA SCOTIA.

[*Reported 3 Russell & Geldert, 453.*]

WEATHERBE, J.—

This was an application to us for a writ of prohibition to stay a suit in the Vice-Admiralty Court at Halifax. This court was convened under the statute, the then Equity Judge, Mr. Justice Ritchie, presiding, for the express purpose of obtaining the rule nisi and the case, one no doubt of importance, was argued before my brothers, McDonald and Smith, and myself in the second division. My brother, McDonald, previous to the attack of illness which still confines him to his house, had considered the subject, and we have been enabled to confer with him recently, and he has expressed his concurrence with us in a case to which we have given as much attention as the unusual number of cases before the court would permit. Proceedings were taken in the Vice-Admiralty Court here in personam before the Judge Ordinary under the Canadian Act, 31 Vict. c. 8, respecting inland revenue, to collect a

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All these subjects are of a class of assets capable of being followed and reclaimed. It was never assumed that money payments were included.

The Act of 1885, while it introduced the word "payment," adhered, in sect. 2, to the same class of assets enumerated in the previous Acts, though it added to the enumeration.

[187] The language is: "Every gift, conveyance, assignment, or transfer, delivery over or *payment* of any goods, chattels or effects, or of any bills, bonds, notes, securities, or of any shares, dividends, premiums, or bonus in any bank, company or corporation, or of any other property, real or personal." Not a word of money payments in this form of the clause any more than in its original shape. The language is fully satisfied by understanding what is aimed at to be the delivery or transfer of any asset of the class described, in payment of a debt.

The only doubt at all possible arose upon the excepting words in the following section. But I have shewn that the inference, indicated by that exception, that money payments were meant to be struck at, was by no means obligatory, but was in fact counter-indicated by the third sub-section of sect. 3.

The plaintiff must, therefore, depend altogether on that sub-section.

I do not find that sub-section easy to understand. The payment being declared void as against the assignment, it may be that the creditor was to rank as if the debt had not been paid; but what of the money? The clause did not, like the corresponding provision in our late insolvent Acts, go on to declare that the amount might be recovered back for the benefit of the estate. Nor can the right to recover it be deduced from sects. 7 and 8.

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—

the case, having no commission myself, and regarding chiefly the Acts of Parliament. The practice and proceedings in this Court are founded mainly on the Imperial Act of 1832, the 2nd Will. 4, c. 51, and the rules and regulations issued thereunder by Her Majesty in Council. Among these, sect. 27 relates to prosecutions for breaches of revenue or navigation laws, which means, of course, such laws as were in force in the several colonies throughout the Empire, and are now in force therein. This section contains the following clause :—‘ In the case of a monition citing all persons in general, and not describing any person by name, no penalty can [458] be pronounced for ; but, if the person by whom the offence was committed should afterwards be discovered, a subsequent monition may be issued in the same suit against him or them for the recovery of the penalties.’ The principle stated in this clause, as well as in the note to our fee-table, folio 8, has a direct bearing upon the case in hand, and this rule, emanating from the Queen in Council, by virtue of the Act of Parliament, has the same authority as if it were in the Act itself. Much was said at the argument of the power of the Dominion Legislature over this as an Imperial Court, and no doubt if a Dominion Act were to attempt to give this Court a jurisdiction analogous to that of Admiralty Courts in the United States, and exceeding that of the High Court of Admiralty in England, I would have no difficulty in holding that such an Act was ultra vires, but it is very certain that no such Act will ever pass. What we are dealing with here is the recovery of penalties by a separate suit, after forfeiture of the goods, for breaches of the inland revenue law of the Dominion. The 156th section of the Act provides that all penalties and forfeitures incurred under the Act may be prosecuted, sued for and recovered in the Superior Courts of law, or the Court of Vice-Admiralty having jurisdiction in the Province where the cause of prosecution arises. For the reasons I have assigned, I am of opinion that this court has jurisdiction, that the 156th section of the Act is not ultra vires, and that the objection now taken cannot prevail.”

We were all satisfied before granting the rule nisi, that the Vice-Admiralty Court is, under the authorities, an inferior court, to restrain which this court, having like powers with the Supreme Court of Westminster Hall, by the express words of our statute, may grant a writ of prohibition, and nothing has been said to

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other words against fraudulent preferences, as its title imports; the debtor's common law right to make an assignment for the benefit of his creditors generally being expressly reserved to him.

Under such an assignment the assignee was the representative of the debtor, and became a trustee for the creditors in respect of the property which came to his hands by virtue of the conveyance, and he administered it in accordance with the trust, which to be valid as against execution creditors must, as is well settled, have been substantially merely a trust for the payment of creditors generally, without preference or priority. The position of such an assignee is well stated by Mr. Justice Strong, in the case of *Burland v. Moffatt* (1).

"In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights of action as the parties making the assignment to him could have enforced."

The decision itself seems to have been disapproved of by the Judicial Committee of the Privy Council, in the [189] recent case of *Porteous v. Reynar* (2), apparently because a wrong view had been taken of some Lower Canadian rule of civil procedure, but there is nothing which detracts from the accuracy of the above quotation as a statement of English law as administered here.

With the simple and private arrangement between the debtor and his creditors under such an assignment, the legislature has now interfered, going far beyond the scope of the original Act, which dealt with fraudulent preferences only, and was a mere extension of the 13 Eliz., c. 5.

We have to consider whether, if at all, it has gone beyond its legitimate province in doing so. The Act in

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—

(1) 11 Can. S. C. R. 76.

(2) 13 App. Cas. 120.

to make that thing a debt, and the provincial court has jurisdiction over all debts. It is denied, however, that the provincial court could be affected by the Canadian Act to make this debt collectable by one procedure, while other debts created by our own or foreign laws are collectable by a different procedure in the same court, unless the words imported the erection of a new tribunal. [460] And it was suggested that it had escaped observation that the B. N. A. Act does not say that new jurisdiction shall not be imposed ; that it is only the organization, maintenance, and procedure that are assigned exclusively to the Province in provincial courts. The provincial court, no one ever doubted, must undertake the duty of adjudicating upon any debt, even that contracted in a foreign country and imposed under foreign laws. Has the Dominion power to require any provincial court to deal with any specified debt ? Is it competent to say, for instance, that our Probate Court shall try all questions of promissory notes and all disputes relating to ships unless by the words used an intention is manifest to set up a new tribunal, that is, to make the provincial court a new court, (as Lord Selborne interprets the language of parliament in relation to elections) to adjudicate upon questions of negotiable paper or shipping ? Cannot every word of the B. N. A. Act be reconciled by giving any provincial court, with its own machinery, authority to administer a remedy for everything coming within matters not exclusively assigned to the Provinces, declared by the Canadian Parliament to be a wrong, in the legal sense of these words "remedy," and "wrong," in just the same way that the provincial court now supplies the remedy ? On the one hand we were told that all this has been settled, and on the other that most of the questions suggested remain undisposed of. We are cautioned in the *Citizens' Insurance Company v. Parsons*, (1) by the judgment of the Privy Council, to decide in each case of dispute as to the distribution of powers, only what is before us, only what is necessary in the particular question in hand, without attempting unnecessary interpretation, a wholesome rule, I should say, for courts to adopt in all cases. We are not much assisted, perhaps, by the discussions and decisions involving the distribution of powers, because there does not seem to be any language in the B. N. A. Act assigning power to the Province

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(1) 7 App. Cas. 96 ; ante vol. 1, p. 265.

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which renders the disputed enactment ultra vires as affecting that distribution. This appears to be an entirely different question. I suppose if the Province were to assign the recovery of a penalty for breach of one of its own laws, on a subject within its exclusive power, to the Vice-Admiralty Court that would be the same question [461] that is now before us. At any rate, if the Province, previous to confederation, had assigned such duty it would be so. Could the old provinces impose a duty on the Imperial Court? Could Australia do so?

One view may be taken of sect. 156 in which, though the Vice-Admiralty Court cannot act, yet it could hardly be said that the clause in question is ultra vires. May it not be that the Dominion Parliament intended to give permission, so far as parliament could, to the Imperial Court—this Vice-Admiralty Court—to exercise jurisdiction, leaving it to the Imperial Parliament, which created the court, to confer the jurisdiction? I suppose no one will doubt that, by amendment of the Imperial Act permitting the Vice-Admiralty Court to exercise the disputed jurisdiction, it could then be exercised in this very case by virtue of both Acts. However that may be, we have now to say whether this Vice-Admiralty Court, organized and clothed with peculiar power and procedure by an Imperial Act, can be set in motion with new powers and a different procedure by a colonial Act passed by the Canadian Parliament. The Legislature of the United States has made certain debts, promissory notes, recoverable in the Admiralty Court of that country and the learned Judge of the Vice-Admiralty Court in his decision claiming the disputed jurisdiction, seems to admit that it would have been ultra vires for the Dominion to have required this Vice-Admiralty [Court] to have adjudicated upon such matters because that exceeded the jurisdiction of the High Court of Admiralty in England. The jurisdiction of this Vice-Admiralty Court was derived from the English statute.

With the greatest deference to the learned Judge, Sir William Young, we think that the admission in his judgment respecting the want of power in the Canadian Parliament to require collection of promissory notes in the Vice-Admiralty Court at Halifax, if good law, is fatal, and that this jurisdiction now claimed, if allowed, must be allowed upon the main ground taken by Mr. Sedgewick, that the Canadian Parliament had the right to empower the court

below to deal with the penalties in question—not on account of any power it derived by virtue of its being an Imperial Court, and thereby having jurisdiction already over the general subject of internal revenue, (which cap. 24, 26 Vict. of the English Acts does not [462] show), but on the broad ground that the parliament of the Dominion is not to be limited in organizing, adopting, or selecting its tribunal or procedure for the trial of any matter over which it has exclusive right to legislate, that its power is not even to be confined to creating new courts or clothing established provincial tribunals with any authority it sees fit, but, that it may require any Imperial Court having jurisdiction of any kind in this country—and even in one Province of the Dominion—to exercise jurisdiction of another kind altogether, and adopt a new procedure, and hear evidence which in no other case would be heard, and even to impose a duty on the war and naval authorities on this station requiring, for instance, the Courts—Courts Martial—which have been erected by the Imperial power for particular purposes, to try offences against regulations of the service, to try questions of Canadian militia, revenue or shipping. I distinctly submitted a suggestion of this to counsel at the argument, and we did not understand and cannot now understand that it can be denied to be the necessary result of the argument presented to us. Mr. Ritchie took the ground that the defendant, belonging to this Province, had the right to be tried for this penalty by the Court of the Province, the forum domicilii I suppose in the ordinary way and by a jury, and that the present proceeding is an invasion of his civil rights and a violation, as I understand his contention, of clause 13 of sect. 92 of the B. N. A. Act. Before the passing of the B. N. A. Act no penalty could be recovered for a violation of a revenue law, or indeed for any penalty, except by a trial by jury. I suppose the Province had then, and has now, the right to deprive a citizen of trial by jury, but the argument is that it would be an invasion of the right for the Dominion Parliament to interfere in this way. Admitting the power of the Dominion to use the Vice-Admiralty Court and adopt procedure, it follows that the trial may be in any form specified. And as for the case of a Dominion Court established for Dominion purposes, no doubt an inhabitant of any Province may be tried without a jury if the Parliament ordains it. Another point was taken. In this case,

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mine whether there shall be a general and uniform law applying throughout the Dominion, or possibly in one or more Provinces only, to persons in that condition, or whether each individual creditor shall be left to the exercise of his common law or equitable remedies against the estate of his debtor. It was strongly urged that the [192] expression "bankruptcy and insolvency" should be interpreted in the light of the legislation which existed at the passage of the confederation Act in this Province, or in England, and that provincial legislation is not unconstitutional so long as it does not attempt to provide for compulsory liquidation, or the discharge of the insolvent. It was said that *ex vi termini*, as thus understood, legislation on the subject of bankruptcy or insolvency must include provisions affecting the status of the debtor, relieving him from his liabilities, and enabling his present or future acquired property to be taken, *in invitum*, for payment of his debts. With this contention I am unable to agree. These are not the only essential features of an insolvent or bankrupt Act. From the creditor's point of view, provisions of primary importance in any law dealing with the condition of insolvency, are those which concern the distribution of the debtor's estate, the prevention of unjust or fraudulent preferences and the equitable adjustment of their own claims. All these are matters which arise out of, or are connected with the debtor's condition of insolvency or general inability to pay his debts, and would, therefore, as forming part of an Act dealing generally and uniformly with that subject throughout the Dominion, or in any particular Province, seem to be as much within the exclusive legislative control of Parliament as any other provisions an insolvent law might contain. I see not why Parliament might not

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## SUPREME COURT OF CANADA.

FERDINAND JACQUES SULTE DIT VADEBONCŒUR

*Appellant ;*

AND

THE CORPORATION OF THE CITY OF THREE  
RIVERS, SÉVÈRE DUMOULIN, AND JOSEPH  
GEORGE ANTOINE FRIGON,*Respondents.**On Appeal from the Court of Queen's Bench for the Province of  
Quebec (Appeal Side).**[Reported 11 Can. S. C. R. 25.]**B. N. A. Act, sect. 91—38 V. c. 76 (Q.)—Regulation of the sale of  
liquor—License fees.*

The old Province of Canada by an Act incorporating the city of Three Rivers conferred on the council authority to make by-laws for restraining and prohibiting the sale of intoxicating liquors or for authorizing such sale subject to such conditions as might be deemed expedient. In 1875 the Legislature of Quebec by a consolidation Act repealed the above and other Acts relating to Three Rivers and re-enacted the former provisions as to the sale of intoxicating liquors ; *Held*, (affirming the judgment of the Queen's Bench) that the Act of 1875 was valid.

Appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), whereby the judgment of the Superior Court at Three Rivers, rendered by Mr. Justice McCord in favour of the appellant, was reversed.

The appellant, wishing to obtain a license under the Quebec License Act of 1878 (41 Vict., c. 3) to keep a saloon, on the 31st March, 1880, presented a certificate signed by twenty-five electors, to the council of the corpor-

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\**Present* :—SIR W. J. RITCHIE, C.J., and STRONG, FOURNIER, HENRY and GWYNNE, JJ.

(1) 5 Legal News, 330 ; *ante* vol. 2, p. 280.

1883\*  
Nov. 17.  
1885\*  
Jan. 12.



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[26] ation of Three Rivers for confirmation, as required by sect. 11 of said Act, and on the 5th May, 1880, requested the officers of the corporation to deliver over to him the certificate of confirmation, which they refused to do, unless the appellant should pay \$200 as required by the by-laws of the corporation.

On this the appellant petitioned for a writ of mandamus dated the 5th May, 1880, alleging that the respondents refused to deliver to him the certificate required by the license Act of 1878, c. 3; that the by-laws relied on were illegal, null and void; that the respondents had not the right, according to the Act of incorporation or any other law, to enact such by-law; that the local legislature could not authorize the council of the corporation of the city of Three Rivers to enact a by-law, with the object of imposing a tax of two hundred dollars, to be paid by those who desired to obtain the certificate of confirmation, required by sect. 11 of the said license Act of 1878; and that finally such by-laws have the effect of regulating commerce, to wit: the sale of spirituous liquors, which is the prerogative of the federal parliament, and that the local legislature acted ultra vires of its powers.

By his petition the appellant asked for the issue of a peremptory mandamus to declare the said by-laws null and to order the officials of the council to sign and deliver the said certificate to the appellant.

The respondents met this petition and the writ:

First, by a demurrer alleging that the respondents had never refused to perform any act which they were bound to do by law, but, on the contrary, that even in the said petition it is alleged that they did not sign nor deliver the certificate asked for, because of the existence of a

by-law to the contrary, which prevented them doing so, before the reception from the appellant of the sum of [27] \$200; and that the principal object of the petition is to obtain the voiding of said by-laws which cannot be done by a writ of mandamus.

Secondly, the respondents pleaded that the Parliament of the Province of Canada, in 1857, by 20 Vict., c. 129, authorized the council to enact the by-laws in question, which are at present in force and obligatory for all; that the sum of \$200 is a duty or fee which must be paid by those who wish to sell spirituous liquors.

And that the British North America Act does not abrogate the said authority, but on the contrary confirms it. Finally, the respondents pleaded une defense au fonds en fait.

The statutes and by-laws bearing on the case are reviewed in the arguments and judgments hereinafter given.

*J. Doutre, Q.C.*, for appellant :—

Supposing the charter of 1857 ample enough to cover the by-law of 1871, could any legislation be had from the provincial legislature after the constitutional Act of 1867, to authorize a by-law to prohibit or regulate the liquor trade, beyond police regulations, such as ordering the closing of bar-rooms at certain hours, on Sundays, or on election days?

The maintenance of the charter of 1857 was protected by sect. 129 of the B. N. A. Act of 1867. As long as the city of Three Rivers was satisfied with that charter the new constitution of Canada could not affect it. But as soon as they demanded and obtained the repeal of that charter they fell under the provisions of the constitutional Act, which placed within the power of the federal

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authority only the regulation of the liquor traffic, as an incident of the regulation of trade generally.

By the consolidation Act of 1875, 38 Vict., c. 76, sect. 1 (Q.), all the statutes concerning the city of Three Rivers were unqualifiedly repealed. From that moment the legislature of Quebec could not delegate powers which it did not itself possess, such as prohibiting or impeding the sale of intoxicating liquors, otherwise than making regulations for the government of saloons, licensed taverns, etc., and the sale of liquors in public places, which would tend to the preservation of good order and prevention of disorderly conduct, rioting, or breaches of the peace. Going further was to assume to exercise a legislative power which pertains exclusively [30] to the Parliament of Canada (1). So held, by the Supreme Court of Canada, in *City of Fredericton v. The Queen* (2). So held, by the Privy Council, in *Russell v. The Queen* (3).

These considerations, as well as those previously insisted upon, seem to have been overlooked by the Queen's Bench.

Incorporating and regulating municipal bodies must be understood to be done in conformity with the general provisions of the constitutional Act. The provincial legislatures cannot authorize municipalities to do things which the legislatures themselves could not do. For instance, the local legislatures could not authorize a municipality to organize or drill militia, a thing which they could not do themselves.

As regards the raising of a revenue for municipal purposes, no doubt they could do it always within the same

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(1) *Regina v. Justices of King's*, 2 Pugsley, 535; *ante* vol. 2, p. 499. (2) 3 Can. S. C. R. 505; *ante* vol. 2, p. 27.

(3) 7 App. Cas. 829; *ante* vol. 2, p. 12.

limit, and it was plainly done and exhausted by 38 Vict., c. 76, sect. 101, sub-sect. 7, which empowered the city of Three Rivers to levy a business tax on the tavern keepers, either directly or by means of a license. Beyond the powers contained in that section, the legislature of Quebec authorized the respondent, if they had jurisdiction from their charter, to levy a license fee, to the extent of \$20, but no more.

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In passing that license Act of 1878, the legislature of Quebec was conscious of its power, as is manifested by the authority granted to Quebec and Montreal to levy a moderate license fee of \$8 and to other municipalities, having jurisdiction from their charter, to impose a license fee up to \$20. The legislature evidently thought that going further would encroach upon federal authority, and amount to partial prohibition or to regulation of traffic.

*N. L. Denonsourt*, Q.C., (*J. M. McDougall* with him) for respondents :—

[31] The Act which created the respondents a municipal corporation gave them the power to enact the by-laws of the 30th January, 1871, and of the 3rd April 1877, and this last Act has not been in any way repealed by the license Act of 1878 of the Quebec legislature, and is not ultra vires (1).

As to the constitutional question the B. N. A. Act, by sub-sect. 8 of sect. 92, gives to local legislatures the right to pass a prohibitory liquor law for the purposes of municipal institutions.

*City of Fredericton v. The Queen* (2) and *Russell v*

(1) See sects. 37 and 265 of 41 Vict., c. 3, and sect. 129 of the B. N. A. Act.

(2) 3 Can. S.O.R. 505; ante vol. 2, p. 27.

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*The Queen* (1) decided that the Parliament of Canada had the power to legislate on traffic of intoxicating liquors; but it is not said that municipalities had no more the right to impose taxes on persons wishing to sell liquors as they had before. So these decisions do not affect in any way the respondents in this present appeal. [The learned counsel also relied on the reasons given by Mr. Justice Ramsay in the court below (2).]

RITCHIE, C. J. :—

No matter of fact comes up before this court. The whole case consists in enquiring whether the corporation and its officers had the right to exact \$200 before delivering their certificate of confirmation of the electors certificate.

I think the appeal should be dismissed. I cannot discover that any of the rights conferred on the corporation of the city of Three Rivers are superseded or taken away by the Quebec License Act of 1878, or any other Act. On the contrary, by sect. 255 of the Quebec License Law of 1878, it is enacted, " But the dispositions of this Act shall in no way affect the rights and powers belonging to cities and incorporated towns by virtue of their [32] charters and by-laws, and shall not have the effect of abrogating or repealing the same," showing how careful the legislature was to make it apparent beyond all doubt, that the existing rights and privileges of incorporated cities were not to be interfered with.

The case of *Hodge v. The Queen* (3), just decided by the Privy Council, covers the constitutional question raised.

(1) 7 App. Cas. 829 ; ante vol. 2, p. 12.

(2) 5 Legal News 832 ; ante vol. 2, p. 280.

(3) 9 App. Cas. 117 ; ante vol. 3, p. 144.

STRONG, J :—

I agree entirely with the judgment delivered by Mr Justice Ramsay in the Court of Queen's Bench, determining that the Quebec License Law of 1878 does not repeal or in any way affect the powers conferred on the city of Three Rivers by its Act of incorporation ; and that the by-law now in question requiring the payment of a license fee of \$200 by tavern keepers, was authorized by that Act. If the Act of incorporation had been passed since confederation, it would have been intra vires, as an exercise of the police power, which by the B. N. A. Act, is vested in the Local Legislatures.

As Mr. Justice Ramsay has so fully and ably considered the case, I do not feel called upon to say anything further on this head. *Hodge v. The Queen* (1) decided by the Privy Council, since the judgment of the Court of Queen's Bench was delivered, having put an end to the question, any further discussion of it is uncalled for. I desire to add, however, that the powers with which the corporation is invested by the Act 37 Vict. c. 129, sect. 37, clause 14 would, if now for the first time conferred upon the municipality by the Local Legislature, be valid under the B. N. A. Act, sect. 92, subsect. 9, as an exercise of the power to raise money, by [33] means of tavern licenses, for municipal purposes. I am of opinion that the appeal should be dismissed with costs.

FOURNIER, J :—

I am also of opinion that this appeal should be dismissed. The constitutional question has now, to my mind, been definitely settled by the decision of the Privy

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(1) 9 App. Cas. 117 ; *ante* vol. 3, p. 144.

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Council in the case of *Hodge v. The Queen* (1). As to the legality of the by-laws, I am of opinion that they are continued in force by the statute, and that the corporation, by virtue of its Act of incorporation, had power to pass the by-laws in question.

HENRY, J :—

The city of Three Rivers was incorporated by an Act of the late Province of Canada (20 Vict. c. 129), by which it received power to raise funds for the expenses of the city, and for improvements, by the imposition of taxes including those on proprietors of houses for public entertainment, taverns, coffee houses and eating houses and on retailers of spirituous liquors, etc. The council of the city was empowered to make by-laws for restraining and prohibiting "the sale of any spirituous, vinous, alcoholic and intoxicating liquors, or for authorizing such sale, subject to such restrictions as they may deem expedient for determining under what restrictions and conditions, and in what manner the revenue inspector . . . shall grant licenses to merchants, traders, shop-keepers, tavern-keepers and other persons, to sell such liquors; for fixing the sum payable for every such license—provided that, in any case, it shall not be less than the sum which is now payable therefor by virtue of the laws at present in force; for regulating and governing all shop-keepers, tavern-keepers and other persons selling such liquors by retail; and in what [34] places such liquors shall be sold, and in such manner as they may deem expedient to prevent drunkenness," etc.

That Act was substantially confirmed by sect. 129 of

(1) 9 App. Cas. 117; ante vol. 3 p. 144.

the B. N. A. Act—leaving it to be continued, repealed, altered or amended, as therein provided.

By a by-law passed by the council of the city in 1871, a license fee of \$100 was imposed on all licensees to keep an inn, hotel, tavern or public house, for the selling or retailing of any spirituous, vinous, alcoholic or intoxicating liquors; and such license was not to be issued until such sum, and all fees should be paid.

In 1875, the Legislature of the Province of Quebec passed an Act amending and consolidating the Act of incorporation of the city of Three Rivers, and several Acts in amendment thereof, and re-enacted the provisions of that Act in relation to licenses, tavern-keepers, etc. leaving the same powers with the council of the city as those conferred by the Act of incorporation in relation to by-laws.

Under the provisions, and by virtue of the power given by the latter Act, the council, by a by-law passed in 1877, raised the license duty from \$100 to \$200.

It is objected by the appellant that the legislation of the Province of Quebec in 1875 was ultra vires, on the ground that by the B. N. A. Act the legislative power to deal with the subject in question was vested in the Parliament of Canada, and not in the Legislature of the Province of Quebec. If that objection is well founded, he would be entitled to our judgment. He refused to pay the sum provided by the later by-law of the council and if the council had not the power to impose the increased duty under the Act of 1875, before mentioned, they got it in no other way.

[35] I am and, I may say, always have been, of the opinion that the B. N. A. Act, if read in the light which a

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knowledge of the subject before the passage of that Act would produce, plainly gives the power of legislation to the Local Legislature in respect of such licenses. I so gave my opinion in the case of *City of Fredericton v. The Queen* (1), argued and decided in this court; and I think it better to refer to my judgment in that case for some of my reasons than to repeat them at length here. It is true that my views expressed in my judgment in that case, as to the Canada Temperance Act, 1878, were not shared by my learned brethren, nor by the Judicial Committee of the Privy Council; but the judgment of this court in that case, and that of the Privy Council in *Russell v. The Queen* (2), contain nothing, or but little, in conflict with the proposition that the Legislature of the Province of Quebec had the exclusive power to deal with the subject-matter in question; and that view is fully sustained by the judgment of the Privy Council in a later case, *Hodge v. The Queen* (3).

By sect. 92 of the B. N. A. Act the Local Legislatures were given the exclusive power to legislate in regard to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes," and also as to "municipal institutions." The power over those subjects is therein stated to be exclusive, and when we find that expression used we would hardly think it necessary to examine other parts of the Act with any expectation of finding a counter provision—the power is not only given expressly but exclusively. Did parliament mean what it said, or did it so provide, and intend that the provision should be overridden and controlled, and rendered totally inopera-

(1) 3 Can. S. C. R. 505; ante vol. 2, p. 27.

(2) 7 App. Cas. 829; ante vol. 2 p. 12.

(3) 9 App. Cas. 117; ante vol. 3, p. 144.

[36] tive? I cannot come to such a conclusion. The uncontrolled power is thus given to the Local Legislatures to raise a revenue for either of the purposes named; it is given as an exclusive right, and unless modified by some one of the enumerated powers in sect. 91, I maintain that the Parliament of Canada has no power to interfere with that right for any object or purpose, or for any reason or consideration whatever. I am not forgetful of the substance and importance of the last clause of sect. 91, which provides that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." Can we, however, conclude that the framers of the Act and Parliament meant, by a clause of such a general character, intended principally to cover unforeseen difficulties, to completely override and control such a plain enactment as the following:

"In each province the legislature may exclusively make laws in relation to shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes."

The object, as stated, was to enable each province to raise a revenue. Under the provisions as to "municipal institutions" the Local Legislatures derive the power to make laws to regulate shops, saloons and taverns. These provisions are explicit as well as comprehensive, and exclude every other legislation in the Dominion as to those subjects; unless, indeed, under the concluding clause of sect. 91, just quoted, they are subordinated to the power of legislation given to the Dominion Parliament as being within one or more of the classes of subjects enumerated

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in sect. 91. The Act most pointedly and effectually ex-
 [37] cludes and prohibits the interference of the Dominion
 Parliament with the exclusive powers of the Local Legis-
 latures as to the matters in question, except (and only in
 that case) the subject-matter comes within one of the
 classes of subjects mentioned and enumerated in sect. 91.
 The first part of sect. 91 gives power to the Parliament
 of Canada,

“To make laws for the peace, order and good govern-
 ment of Canada, in relation to all matters not coming
 within the classes of subjects by this Act assigned ex-
 clusively to the legislatures of the provinces.”

The right to make laws for the peace, etc., of Canada,
 is as fully restricted to such subjects as do not come
 within the classes of subjects assigned to the legislatures
 of the provinces, as language can make it. The subject
 of licenses for shops, taverns, etc., is exclusively so
 given, and therefore the right to make laws for the good
 government of Canada does not include power to interfere
 with local legislation. Here, then, the power is limited ;
 and any substantial interference with the functions
 assigned to the legislatures of the provinces, is excepted
 from the power conferred by the general terms of the
 preceding part of the clause. It was, to my mind, the
 clear intention of the clause, and of those who framed it,
 that the exclusive powers given to the legislatures of the
 provinces should not be affected ; but that, outside of and
 apart from them, the power of the Parliament of Canada
 was to be unlimited.

Legislation by that Parliament, under the power con-
 veyed by that clause, conflicting with Acts of the local
 legislatures under the powers exclusively given by sect.
 92, I consider ultra vires.

In the judgment of the Privy Council in *Russell v. The Queen* (1), I find this sentence :

" It was not, of course, contended for the appellant that the Legislature of New Brunswick could have passed the [38] Act in question, which embraces in its enactments all the provinces ; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion, to take effect at the same time throughout the whole Dominion."

If not denied when such a proposition was stated, it is the same as if it were alleged to have been admitted. If so admitted by the counsel at the argument, there was but little left requiring the judgment of the august tribunal considering the case. The result was therefore, only what would be reasonably expected.

I am always ready to give such a construction to that concluding clause of sect. 91 as will give it all the effect it was intended to have and it is legitimately entitled to, but I cannot do so to the extent of nullifying other provisions so unambiguous and explicit as those of sect. 92, to which I have referred. My learned brethren differed from me in case of *City of Fredericton v. The Queen* (2), on the ground that the right to legislate as to " trade and commerce " being vested in the Parliament of Canada, the Local Legislatures could not enact the same provisions as are found in the Canada Temperance Act, 1878, and consequently the power must be in the Canadian Parliament to pass that Act. That was, however, a result and conclusion I felt unable to arrive at or appreciate, for the reasons given in my judgment in that case. The same questions involved in *City of Fredericton v. The*

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(1) 7 App. Cas. p. 840 ; ante vol. 2, p. 24.

(2) 3 Can. S. C. R. 505 ; ante vol. 2, p. 27.

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Queen (1) came subsequently, in the case of *Russell v. The Queen* (2) before the Judicial Committee of Her Majesty's Privy Council. The grounds taken by my learned brethren were neither adopted nor repudiated in the judgment in the latter case, but the same result on other grounds was reached, and the constitutionality of the Canada Temperance Act, 1878, established on grounds [39] which, in my opinion, do not touch the issue before us in this case. It has been argued that because a prohibitory Act of the Legislature of any of the provinces would be an interference with "trade and commerce," the power to deal with the regulation of which was given to the Parliament of Canada, such an Act would be ultra vires; and therefore the power to pass such an Act must necessarily be in that parliament. I cannot adopt that proposition, because I think that, independently of other reasons, such legislation would, and must, necessarily override and destroy the provision intended to enable the local legislatures to raise the revenue, as in sub-sect. 9 of sect. 92. No doubt, it was fully understood and agreed upon, by those who considered the subject of the confederation of the four provinces, that certain means for raising a revenue for the purposes named in that subsection should be given to the local legislatures. Some of the provinces were then raising thousands of dollars by revenues from licenses; and it must be assumed that such means of revenue were intended to be continued. If therefore, the Parliament of Canada passed a prohibitory Act, it would tend to sweep away the revenues intended to be raised and expended in each of the provinces. No one could or would object to the passage of such an Act, if rights incontestably vested in the local legislatures,

(1) 3 Can. S. C. R. 505; ante vol. 2, p. 27.

(2) 7 App. Cas. 829; ante vol. 2, p. 12.

as to revenue for the purposes named, were not interfered with. The learned judges of the Privy Council hesitated to ascribe the power to pass such an Act to the right to legislate for the "regulation of trade and commerce," possibly considering that prohibitory legislation might not be "regulation." Suppose, under what is termed the local option provisions of the Canada Temperance Act, 1878, the prohibitory principle should be adopted by a large number of the districts in a province, there would [40] necessarily be a comparative loss of local revenue. That loss would be caused by means of Dominion legislation, and without any provision for making up the loss to the province. Taking the whole of the B. N. A. Act, into consideration, with the knowledge of the state of matters existing in the four confederated provinces at the time of confederation, can it be fairly and reasonably contended that such a result was intended by the framers of the constitution? As one of those so engaged, as well as in the preparation of the B. N. A. Act, I can arrive at no such conclusion. My decision in this case, and the views I have expressed, are, however, the result of my construction of the words and phraseology of the Act itself.

It was claimed that the license Act of 1878 limited the power of the corporations by the provisions of sect. 36. Sect. 37, however, enacts that "The preceding provision does not deprive cities and incorporated towns of the rights which they have by their charters or by-laws."

For the reasons given, I think the appeal should be dismissed, and the judgment below confirmed, with costs.

GWYNNE, J :—

By the Act 20 Vict. c. 129, passed by the parliament of the late Province of Canada, the city of Three Rivers

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was incorporated, and by sect. 36, sub-sect. 7 of that Act it was enacted that in order to raise the necessary funds to meet the expenses of the said city, and to provide for the several necessary public improvements in the said city, it should be lawful for the council of the city, among other taxes, to impose certain duties of annual taxes on the proprietors or occupiers of houses of public entertainment, taverns, coffee houses and eating houses, [41] and on all retailers of spirituous liquors, etc., and by sect. 37 of the Act the said council was empowered to make by-laws :

“For (among other things) restraining and prohibiting the sale of any spirituous, vinous, alcoholic and intoxicating liquor, or for authorizing such sale, subject to such restrictions as they may deem expedient for determining under what restrictions and conditions, and in what manner, the revenue inspector of the district of Three Rivers shall grant licenses to merchants, traders, shop-keepers, tavern-keepers, and other persons to sell such liquors, for fixing the sum payable for every such license, provided that in any case it shall not be less than the sum which is now payable therefor by virtue of the laws at present in force. For regulating and governing all shop-keepers, tavern-keepers, and other persons selling such liquors by retail, and in what places such liquors shall be sold in such manner as they may deem expedient to prevent drunkenness, and for preventing the sale of any intoxicating beverage to any child, apprentice or servant.”

This Act was in force when the B. N. A. Act was passed, which, by its 92nd section, items 8 and 9, enacts, that in each province thereby constituted the legislature may exclusively make laws relating to municipal institu-

tions in the province, and to shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes; and by its 129th section, that, except as otherwise provided by the Act, all laws in force in Canada, Nova Scotia or New Brunswick, at the Union, should continue in force in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the union had not been made, subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Imperial Parliament) to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the respective provinces, according as the matter of each such Act should be subjected by the B. N. A. Act to the authority of parliament, or to that of the provincial legislatures. The effect, then, of sect. 129 was to continue in force all the [42] provisions of the Act, 20 Vict. c. 129, incorporating the city of Three Rivers, except in so far as provision to the contrary was made, if provision to the contrary was made, by the B. N. A. Act. While this Act was so continued in force the council of the city passed a by-law in 1871, whereby it was enacted that no hotel-keeper or other person could obtain a license to keep an inn, hotel, or tavern, or any public house for the selling and retailing any spirituous, vinous, alcoholic or intoxicating liquor, in the city of Three Rivers, before conforming to all the provisions of the law which regulates the obtaining such license, nor until he shall have obtained a certificate, as required by law, which certificate shall not be granted by the said council until such hotel-keeper or other person shall have paid to the secretary-treasurer of the said council the sum of one hundred dollars over and above all duties and fees on such license. Now, this by-law having for its authority only the above quoted

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sections of 20 Vict. c. 129, could only be a valid by-law in the event of such sections being continued by sect. 129 of the B. N. A. Act, which section only continued the above sections of 20 Vict. c. 129, if there was no provision to the contrary in the B. N. A. Act, and in that case the right to repeal, abolish, and alter the provisions contained in the above sections of the 20 Vict. c. 129, equally with all other sections of that Act as had been continued by sect. 129 of the B. N. A. Act, would seem naturally to fall within the jurisdiction of the provincial legislature under the clause of the 92nd section, which places under the exclusive jurisdiction of the legislatures of each province, the power to make laws in relation to municipal institutions in the province. Acting on this assumption, the Legislature of the Province of Quebec, in 1875, passed the Act, 38 Vict. c. 76, for amending [43] ing and consolidating the Act of incorporation of the city of Three Rivers and the different Acts amending that Act, and by sects. 74 and 75 of this Act, re-enacted in substance and almost verbatim the provisions contained in the above 37th section, and by the 101st section, sub-sect. 7, the precise provision contained in the above 36th section of 20 Vict. c. 129.

Now, is there anything in the B. N. A. Act which makes it to have been ultra vires of the Legislature of the Province of Quebec to re-enact, as they have done by 38 Vict. c. 76, the substance of the above sections of 20 Vict. c. 129, regulating the conditions upon which licenses to sell spirituous liquors may be granted in a municipality by the revenue inspector and for regulating the conduct of the licensed dealers therein? This question, as it appears to me, must be answered in the negative. I cannot doubt that by item No. 8 of sect. 92, which vests in the provincial legislatures the exclusive

power of making laws in relation to municipal institutions, the authors of the scheme of confederation had in view municipal institutions as they had then already been organized in some of the provinces, and that the term as used in the B. N. A. Act, unless there be some provision to the contrary in sect. 91 of the Act, comprehends the powers with which municipal institutions, as constituted by Acts then in force in the respective provinces, were already invested for regulating the traffic in intoxicating liquors in shops, saloons, hotels and taverns, and the issue of licenses therefor, as being powers deemed necessary and proper for the beneficial working of a perfect system of local municipal self-government. Unless, then, there be some provision in the B. N. A. Act to the contrary, the Legislature of the Province of Quebec had full power, in any Act passed by [44] it creating a municipality, or in any Act amending and consolidating the Acts already in force incorporating the city of Three Rivers, to insert the provisions in question here which are contained in sects. 74, 75 and 101 of 38 Vict. c. 76.

It seems to be supposed that the judgment of this court in the *City of Fredericton v. The Queen* (1) is an authority to the effect that since the passing of the B. N. A. Act it is not competent for a provincial legislature to restrain or prohibit, in any manner, the sale of any spirituous liquors, and that therefore the Legislature of the Province of Quebec could not invest the corporation of the city of Three Rivers with the powers purported to be vested in them by sects. 74 and 75 of the Act 38 Vict. c. 76, and that the Dominion Parliament alone could enact the provisions contained in sect. 75. The effect of this contention, if sound, would be, that instead

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(1) 3 Can. S. C. R. 505; *ante* vol. 2, p. 27.

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of the provincial legislatures having exclusive power to make laws in relation to municipal institutions in the province, which by the B. N. A. Act they are declared to have, and which the authors of the scheme of confederation intended they should have, the joint action of the Dominion Parliament and of the Legislature of any Province would be necessary to invest municipal corporations in that province with powers which have always been considered to be necessary and proper for the effectual working of that system of local municipal self-government which prevailed at the time of confederation being agreed upon. But the *City of Fredericton v. The Queen* (1), raised no such question, nor is any such point professed to be decided by our judgment in that case. There was no question there as to the right of a provincial legislature to insert, in an Act passed by it in relation to municipal institutions, such a provision as [45] that in question here. What was decided in the *City of Fredericton v. The Queen* (1) was, that the Provincial Legislatures had not jurisdiction to pass such an Act as the Canada Temperance Act of 1878, and that the Dominion Parliament alone was competent to pass it; and of this opinion, also, was the Judicial Committee of the Privy Council in *Russell v. The Queen* (2); but there was nothing whatever in the decision calculated to call in question the right of the provincial legislatures to insert, in all Acts in relation to municipal institutions, such provisions as those in question here, which relate to the raising of revenue from the issue of tavern licenses, and to the establishment of regulations of a purely local and municipal character for governing the conduct of the parties licensed, which have always been deemed to be usual, and indeed proper and necessary regulations, to be established and enforced in all well-ordered municipali-

(1) 3 Can. S. C. R. 505; ante vol. 2, p. 27.

(2) 7 App. Cas. 829; ante vol. 2, p. 12.

ties, and essential to the efficient working of a system of local municipal self-government; and which, being of a purely local, municipal, private and domestic character, do not come within the true meaning of the term "regulation of trade and commerce" as used in sect. 91, which term, as there used, is to be construed as applying to subjects of a general, public and quasi national character, in which the inhabitants of the Dominion at large may be said to have a common interest, as distinct from those matters of a purely provincial, local, municipal, private and domestic character, in which the inhabitants of the several provinces may, as such, be said to have a peculiar and local interest. The by-law, therefore, of the city of Three Rivers, passed in 1877, increasing the license fee as established by the by-law of 1871, from \$100 to \$200, was authorized by the Act 38 Vict. c. 76, and there is nothing in the license Act, 41 Vict. c. 3, depriving the corporation of the powers vested in it by [46] 38 Vict. c. 76. On the contrary, all those powers are, by sect. 37 of 41 Vict. expressly preserved intact. The plaintiff, therefore, has failed to show any right to have had granted to him the certificate which he demanded of the corporation officers, he having failed to pay the \$200 established by the by-law of the city then in force, as the fee necessary to be paid to entitle him to such certificate.

If a corporation, under colour of passing a by-law in virtue of the powers vested in it, should, for the purpose of effecting a total prevention of the trade in spirituous liquors in the municipality, pass a by-law establishing such an extravagant license fee as would have the effect of total annihilation of such trade within the municipality, the question of the validity of such a by-law will be open to consideration upon a proceeding raising that question. No such question is involved in the present case, and it will be time enough to entertain it if and when it shall arise.

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 Nov. 9.  
 1887\*  
 June 20.  
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THE CENTRAL VERMONT RAILWAY,  
 APPELLANTS  
 AND  
 THE TOWN OF ST. JOHNS,  
 RESPONDENT.

*On Appeal from the Court of Queen's Bench for Lower Canada  
 (Appeal side).*

[*Reported 14 Can. S. C. R. 288.*]

*Navigable rivers, municipal control of— 43 & 44 V. c. 62 (Q.)*

The control over navigation conferred on the Dominion Parliament by the British North America Act does not prevent the Provincial Legislatures from exercising municipal and police control on navigable rivers ; consequently the Quebec Act 43 & 44 Vict. c. 62, extending the limits of the town of St. Johns to the middle of a navigable river was held to be valid, and to confer the right to tax property within the added limits. Judgment of the Court of Queen's Bench on this point affirmed.

Appeal from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) affirming the judgment rendered by the Superior Court.

The Central Vermont Railway Co., a body corporate, on the 19th day of December, 1884, presented a petition (*requête libellée*) addressed to any one of the judges of the Superior Court for Lower Canada, together with an affidavit in support of said petition, praying that a writ of injunction should issue addressed to the respondents, the town of St. Johns and to one F. X. Lanier, a bailiff, enjoining upon them to suspend all proceedings upon a certain warrant of execution—distress warrant—issued by the said corporation of the town of St. Johns, against

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\**Present* :—SIR W. J. RITCHIE, C.J., and STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

(1) M. L. R. 4 Q. B. 466 ; *post* p. 332.

the appellants, for the collection of certain taxes upon one-half of appellants' railway bridge over the river Richelieu, its railway tracks and a wooden office, which said warrant had been placed in the hands of the said Lanier for execution, until such time as a further order should be made; and praying also that the seizure or execution, and all proceedings relative thereto, and acts in virtue of which taxes had been imposed against the appellants be declared illegal, null, and of no effect, and be annulled.

The grounds of complaint, as set forth in the petition for an injunction, were the following:—

“The respondents have no authority or power to levy a tax upon the appellants:

“1st. Because the said bridge and approach are not situated within the limits and boundaries of said town, the clause of the Act of incorporation of the said town fixing the limits of the said town in the middle of the Richelieu river is ultra vires and illegal, the said river being a navigable river and therefore under the sole control of the Dominion Government of Canada, and by reason thereof the said bridge not being subject to taxation within the meaning of the law;

“2nd. Because according to sect. 86 of their Act of incorporation the said corporation of the town of St. Johns have no right to levy a tax upon immovable property, but only sur les personnes et les propriétés mobilières de la ville, and the said railway bridge being an immovable, and therefore not subject to taxation by said corporation;

“3rd. Because the said assessment rolls prepared by the assessors duly named by said corporation are illegal, exorbitant and irregular, so far as petitioners (appellants) [290] are concerned, they being assessed for property not belonging to them and not in their possession, to wit: for all the portion of railway tracks, materials, etc.,

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from Jacques-Cartier street to Longueuil street of said town of St. Johns, and this to the knowledge of said corporation, which although often urged to change and modify said assessment rolls in so far as petitioners (appellants) are concerned, refused so to do and persisted in said valuation, and still persist therein although legally and duly notified of its irregularity and illegality ;

“ 4th and 5th. Because respondents have exceeded their powers in imposing said taxes, and in causing said warrant to be issued for the recovery of said taxes ; and because the said warrant and seizure were issued illegally and are irregular, informal, null and void.”

\* The respondents contested this petition by preliminary pleas and by demurrer and a contestation to the merits.

In their demurrer they alleged that the facts related in said petition do not disclose any ground for a writ of injunction ; and in their plea or contestation to the merits, they contended that the allegations of appellants' petition are false ; that in virtue of their charter, respondents have the right to impose taxes on all immovables situated within the boundaries of said town, including that part of the said bridge situated within the limits of the said town ; that all the immovables for which said appellants are assessed, are occupied by them and are entered in their name on the assessment roll of the said respondents and that no other proprietor thereof is known to the respondents ; that the taxes in dispute have been regularly imposed by said respondents ; that the assessment made by respondents is not exorbitant ; that the warrant of execution has been regularly issued and that appellants had another and simple and inexpensive [291] sive remedy against said taxation according to the Act of incorporation of the respondents, and that they ought to have availed themselves of that remedy within the three months after the homologation of the assessment roll of the respondents.

The respondents also pleaded the general issue.

*L. R. Church*, Q.C. for appellants.

*Robidoux*, Q.C. for respondents.

The statutes and authorities relied on are reviewed at length in the judgments.

MITCHELL, C.J. :—

[After stating how the appeal arose and deciding that the assessment was invalid the learned Judge continued, p. 493] :—

There is nothing whatever in my opinion in the objection that the 43 and 44th Vict. c. 62, fixing the eastern boundary of the corporation of St. John's at an imaginary line passing through the middle of the Richelieu river was ultra vires of the legislature of the Province of Quebec, and therefore unconstitutional.

The appeal in this case should, I think, be allowed.

STRONG J. :—

[The judgment of Mr. Justice Strong is omitted as it deals solely with the question whether the assessment included property of the appellants, not liable to taxation].

[*Translated.*]

FOURNIER, J. :—

In this case the question is as to the legality of taxes imposed by the respondent on certain property in possession of the appellants within the limits of the town of St. Johns. One of the properties taxed is the part of the bridge built on the river Richelieu, with the approach and the posts which are situated within the limits of the town of St. Johns, extending from the bank to the middle of the river Richelieu. The other is the part of the railway of the appellants situated in the said town of St. Johns extending from the street Jacques Cartier to the

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street Longueuil. In the assessment roll this property is described by the term "railway track." The latter is a wooden building used as an office.

The appellants, who have neglected to apply to the Superior Court within the time appointed for attacking the assessment roll, attempt by a writ of injunction to reach the same end. In their petition they set out, among other things, the following pleas:—

1. That the bridge is not situated within the limits of the town, because the clause of the Act of incorporation fixing the limits in the middle of the river Richelieu is unconstitutional, the said river being navigable, and therefore under the exclusive jurisdiction of the parliament of Canada.

[297] 2. That the town of St. Johns has not power to tax immovable property, but only persons and movable property.

3. That the assessment roll is illegal and excessive inasmuch as it taxes the appellants for a property which does not belong to them and which they do not possess, in the town of St. Johns, namely, the "railway track," the part of the railway extending from the street Jacques Cartier to the street Longueuil.

4. Lastly, illegality of warrant of distress, etc.

The respondents have answered that in virtue of their charter they had a right to tax all immovable properties situated within their limits, that the properties for which the appellants are assessed are occupied by them, and that they are the only known owners of them. The respondents deny that the valuation is excessive, allege that the warrant is regular, and that the appellants ought within three months from the date of the assessment roll to have taken the proceedings for attacking the roll pointed out by the Act of incorporation.

This contest raises the following questions: Had the Legislature of Quebec the right to fix the middle of the

river Richelieu as the limit of the town of St. Johns? Have the respondents power by their charter to tax immovables situated within their limits? Is the assessment of the "railway track" from the street Jacques Cartier to the street Longueuil legal?

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The first question, as to the power of the Legislature of Quebec to fix the limits of the town of St. Johns at the middle of the river Richelieu, scarcely deserves examination. If it is indisputable that navigable rivers are, for the purposes of navigation, under the control of the parliament of Canada, it is no less true that the provinces have, on these same rivers, the right of exercising all the municipal and police powers, provided that their legisla- [298] tion does not cause any impediment to navigation. The Act 43 and 44 Vict. c. 62, which has extended the limits of the town of St. John to the middle of the river Richelieu does not contain any provision of a nature to affect the interests of navigation.

[The remainder of the judgment is omitted, the same having no reference to the constitutional question.]

HENRY, J :—

[The judgment of Mr. Justice Henry is omitted as it relates solely to the question whether or not property of the appellants had been improperly assessed.]

TASCHEREAU, J :—

As to the contention that the Act extending the limits of the town of St. Johns to the middle of the Richelieu river is unconstitutional, because the said river, being navigable, is under the exclusive control of the Federal [307] Parliament, there is nothing in it.

[The remainder of the judgment is omitted, the same having no reference to the constitutional question.]

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[After discussing the question whether the assessment of the appellants' property was valid, the learned Judge continued, p. 313] :—

I can see no objection to the limits of the town being extended to the middle of the river by a provincial statute, and my judgment proceeds upon the assumption that they are effectually so extended. (1)

[The remainder of the judgment is omitted, the same having no reference to the constitutional question.]

JUDGMENT OF COURT OF QUEEN'S BENCH—APPEAL SIDE.

[*Reported M. L. R. 4 Q. B. 466.*]

The judgment of the court (2) was delivered by

DORION, C. J. :—

This case appeared to raise important questions, but on looking into it the court does not find much difficulty. By the Act of incorporation of the town of St. Johns, the eastern limit was fixed at a line running in the middle of the river Richelieu. The Central Vermont Railway Company have a bridge crossing the river. The assessors of the municipality of the town of St. Johns have for the last four years assessed the part of the bridge which starts from the north shore to the middle of the river. The municipality were about to collect the amount of the taxes, and issued their warrant, when the Central Vermont took a writ of injunction to have it ordered that the town should not collect the taxes, because they

(1) [This judgment was affirmed by the Privy Council, 14 App., Cas. 590. referred to in the judgment].

The constitutional question was not raised in the argument and is not (2) DORION, C. J., and MONK, RAMSAY, CROSS and BABY, JJ.

were ultra vires. The reason assigned was this : That the Province of Quebec could not by the Act, which was passed in 1880, unite to the town of St. Johns part of a navigable river under the control of the Dominion Parliament ; and that the bridge which was over the river could not be taxed by the municipality. There can be no doubt that the limits of the town are the middle of the river bed. It is territory within the jurisdiction of the Local Legislature ; and that being so it would be a singular thing if the authority of the [483] corporation did not extend to what was done on the river. For example, places for the sale of liquor might be established every winter on the ice without any license. The river is not under the control of the Dominion Parliament. " Navigation and shipping " are the words used in the B.N.A. Act. That does not mean the river at all. The river itself belongs to the local Crown domains. Of course the Local Legislature could not stop navigation on the river, that is all. When the local Act said the limits of the town should extend to the middle of the river, it merely vested the municipality with authority to make laws for the river. The other objections which have been raised to the validity of the assessment do not appear to us to be well founded.

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 1888*
 March 15.

JOHN H. R. MOLSON, ET AL,
 (PETITIONERS) APPELLANTS;

AND

WILLIAM B. LAMBE, ÈS-QUALITÉ,
 (INTERVENANT) RESPONDENT.

*On Appeal from the Court of Queen's Bench for Lower Canada
 (Appeal Side).*

[*Reported 15 Can. S. C. R. 253.*]

*Licensed brewer—Quebec License Act—41 Vict. c. 3 (P. Q.)—
 43 Vict. c. 19 (D).*

The inspector of licenses for the revenue district of Montreal, charged a drayman in the employ of certain brewers duly licensed under the Dominion Statute, 43 Vict., cap. 19, before the Court of Special Sessions of the Peace, at Montreal, with having sold beer outside the business premises of the brewers, but within the said revenue district in contravention of the Quebec License Act of 1878. Thereupon the brewers claiming inter alia, that being licensed brewers under the Dominion Statute they had the right to sell beer by and through their employees and draymen without a Provincial license, and that the Quebec License Act and its amendments were ultra vires, and if constitutional did not authorize the complaint, caused a writ of prohibition to be issued out of the Superior Court enjoining the Court of Special Sessions of the Peace from further proceeding ;

Held, per Ritchie, C.J., and Strong, Fournier and Henry, JJ., that the Quebec License Act and its amendments were intra vires, and that the Court of Special Sessions of the Peace at Montreal, having jurisdiction to try the alleged offence, and being the proper tribunal to decide the question of fact and of law involved, a writ of prohibition did not lie.

**Present* :—SIR W. J. RITCHIE C.J., and STRONG, FOURNIER, HENRY, TASCHEREAU and GWYNNE, JJ.

Per Taschereau and Gwynne, JJ., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition.

Per Gwynne, J. The Quebec License Act of 1878 imposes no obligation on brewers to take out a Provincial license to enable them to sell their beer, and therefore the Court of Special Sessions of the Peace had no jurisdiction, and prohibition should issue absolutely.

Semble :—A license from the Dominion Government granting authority to a brewer to manufacture beer, does not confer the right to sell the beer manufactured under such license elsewhere than on the brewer's premises.

[254] Appeal from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (1) affirming the judgment of the Superior Court (2).

The proceedings in this case were commenced before the Court of Special Sessions of the Peace sitting in the city and district of Montreal, by the issue of a summons and complaint by M. C. Desnoyers, Esq., police magistrate, against the appellant Andrew Ryan, upon the complaint of the present respondent, W. B. Lambe, Esq., inspector of licenses for the revenue district of Montreal, charging the said Andrew Ryan with having sold intoxicating liquors without a license.

The defendant pleaded as follows :

"The defendant for plea alleges :—

"That he is and was at the time mentioned in the information, a servant and employee of the firm of J. H. [256] R. Molson & Bros., brewers of the said city of Montreal, who hold a license from the Dominion of Canada, under the provisions of the Act of the Parliament of Canada, and who have been in business as such brewers in Montreal for over eighty years. That during the whole of the said term and up to the present time it has always been the custom and usage of trade of brewers to send

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(1) M. L. R. 2 Q. B. 381; *post* p. 357.

(2) M. L. R. 1 S. C. 264. [This

judgment is omitted as not bearing on the constitutional question.]

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around through the country their drays with beer, which beer was sold by their draymen during their trips to the said customers.

“That on the occasion charged in the said information the said defendant was a servant and drayman of the said firm of J. H. R. Molson & Bros.

“That if the said defendant sold any beer whatsoever he so sold it as the agent and as the drayman of the said J. H. R. Molson & Bros., and under and by virtue of their authority under the said license, and sold it according to the custom and usage of trade in the said province ever since the brewers were first established therein.

“That the said John H. R. Molson & Bros., being licensed under the provisions of the said Act of the Parliament of Canada, are not liable to be taxed either by or through their employees or draymen under the provisions of any Act passed by the Legislature of Quebec.

“And defendant further saith that he is not guilty in manner or form as set forth in the said information and summons.

“Wherefore, defendant prays the dismissal of the said prosecution.”

[257] Before any decision was given J. H. R. Molson and J. T. Molson doing business under the firm of J. H. R. Molson & Bros., and Andrew Ryan, applied by petition to the Superior Court for a writ of prohibition to prohibit the said M. C. Desnoyers, police magistrate, from further proceeding upon the said summons and complaint, on the ground that Ryan committed no offence whatever against [258] any Act of the local legislature :—

“(a) Because there is no Act of the legislature of the Province of Quebec which authorizes the said complaint and prosecution.

“(b) Because the pretended Act of the legislature, upon which such prosecution is founded, is not an Act of the legislature of the Province of Quebec, but purports to have been made and enacted by Her Majesty the Queen, Her Majesty the Queen having no right or title to pass Acts binding on the Province of Quebec.

“(c) Because the pretended Act intituled “The Quebec License Law of 1878,” under which the said prosecution is instituted, is entirely illegal, null and void and unconstitutional, the same not being passed by the proper body gifted with legislative powers upon the subject in the Province of Quebec.

“(d) Because the said Act purports to treat of and regulate criminal procedure.

“(e) Because the penal clause is by fine and imprisonment.

“(f) Because your said petitioner, Andrew Ryan, being in the employ and being the drayman of your other petitioners, and acting under their orders, the act of your petitioner Ryan selling the said intoxicating liquor, to wit, beer, was the act of your other petitioners, co-partners, who in their license from the Government of the Dominion of Canada were authorized and empowered so to sell such intoxicating liquor.

“(g) Because your said petitioners, co-partners, being licensed brewers, had the right of selling by and through their employees and draymen without any further license whatsoever, under the provisions of the Quebec License Act of 1878.

“(h) Because the legislature of the Province of Quebec have no right whatsoever to limit or interfere with the traffic of brewers duly licensed by the Government of Canada.

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“That under these circumstances the said court of Spécial Sessions of the Peace and the said Mathias C. Desnoyers have unlawfully and improperly taken jurisdiction over the said Andrew Ryan, your petitioner, and the other petitioners, and that it has become necessary for them for their own preservation to apply for a writ of prohibition to prohibit the said court of Spécial Sessions of the Peace, sitting at the said city of Montreal, and the said Mathias C. Desnoyers from taking jurisdiction over them your petitioners, and further proceedings on the said summons and complaint.”

The respondent, in his quality of inspector of licenses, intervened to support the complaint and to contest the writ of prohibition, and after issue joined and admissions filed by the parties of the matters of fact set forth in the [259] proceedings, the Superior Court held that the Quebec License Act of 1878 and its amendments were constitutional, and that a writ of prohibition did not lie; on appeal to the Court of Queen's Bench for Lower Canada (appeal side) the judgment of the Superior Court was confirmed, but the holding that prohibition did not lie was reversed.

W. H. Kerr, Q.C. for the appellants.

Geoffrion, Q.C. and *N. H. Bourgouin* for the respondent.

In addition to the arguments and authorities relied on in the court below (1), counsel for the appellants cited *Lloyd on Prohibition* (2); *High on Mandamus* (3); and counsel for the respondent cited *Simard v. Corporation du comté de Montmorency* (4); *High on Extraordinary*

(1) M. L. R. 2 Q. B. 328; *post* p. 357.

(2) Pp. 29-30.

(3) Sect. 781.

(4) 8 Rev. Leg. 546.

Legal Remedies (1); *Griffith v. Rioux* (2); *Dion v. Chauveau* (3); *Côte v. Paradis* (4).

RITCHIE, C.J. :—

In view of the cases determined by the Privy Council, since the case of *Severn v. The Queen* (5) was decided in this court, which appear to me to have established conclusively that the right and power to legislate in relation to the issue of licenses for the sale of intoxicating liquors by wholesale and retail belong to the local legislature, we are bound to hold that the Quebec License Act of 1878 and its amendments are valid and constitutional. By that Act, sect. 2, the sale of intoxicating liquors without license obtained from the Government is forbidden. By sect. 1 the words "intoxicating liquors" mean, inter alia, ale, beer, lager, etc. Section 71 provides that whosoever without license sells in any quantity whatsoever intoxicating liquors in any part of this [260] province municipally organized, is liable to a fine of \$95 if such contravention takes place in the city of Montreal. And sect. 196 of 41 Vict. c. 3, provides for the courts which shall have power to try actions or prosecutions for breach of this law in these words :

" All actions or prosecutions, where the amount claimed does not exceed one hundred dollars, may be optionally with the prosecutors, brought before the Circuit Court, but without any right of evocation therefrom to the Superior Court, or before two Justices of the Peace in the judicial district, or before the Judge of the sessions of the peace, or before the court of the recorder or of the police magistrate, or before the district magistrate; but if the amount claimed exceeds one hundred dollars they shall be brought before the Circuit Court or the Superior

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(1) Pp. 550-558.

(2) 6 Legal News 21; ante vol. 3 p. 348.

(3) 9 Quebec Law Rep. 220.

(4) 1 Dorion 374.

(5) 2 Can. S.C.R. 70; ante vol. 1 p. 414.

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Court, according to the competency of the court, with reference to the amount claimed."

[The learned Chief Justice then after considering the question whether the Police Magistrate had jurisdiction to try the offence charged, continued p. 263]:

To determine in the case before us, whether Ryan has been guilty of a breach of the license Act, questions of fact as well as of law are, by defendant's own showing, necessarily involved, the determination of which is now in progress of trial before a tribunal having jurisdiction over the subject matter in controversy, and the only ground on which prohibition appears to me to be asked is the assumption that the judge will decide, not only the questions of law, but those of fact, incorrectly against the defendant. There certainly is no usurpation of jurisdiction in this case, and no issue which the inferior court is incompetent to try; on the contrary, the only issue in the case, namely, whether the defendant was, or was not, guilty of selling liquor without a license, contrary to the provisions of the Quebec License Act of 1878, could only be tried under, and by virtue of, the section before referred to, and under which section, in my opinion, M. C. Desnoyers, the police magistrate, had unquestionable [264] jurisdiction, and constituted the legal and proper tribunal to deal with any alleged infringement of the said Act, and therefore no cause is shewn to justify the issue of a writ of prohibition, and this appeal should be dismissed with costs.

STRONG, J:—

Apart altogether from the reasons given by the Court of Appeal, and from the other points raised and argued here, and exclusively for the reasons and upon the authorities stated and referred to by me in a judgment delivered in the case of *Poulin v. Quebec* (1), to which I

(1) 9 Can. S. C. R. 185; ante vol. 8 p. 230.

now desire to add a reference to the cases and authorities collected in Short on Informations (1), a work recently published, I am of opinion that a writ of prohibition did not lie in the present case and that this appeal should therefore be dismissed with costs.

[*Translated.*]

FOURNIER J:—

The application for a writ of prohibition directed to the Court of Special Sessions of the Peace for the District of Montreal was designed to hinder that court from hearing and disposing of a prosecution directed against one Ryan, a servant of the appellants, who are brewers and distillers, for having sold intoxicating liquors manufactured by them without being furnished with a license for that purpose under the license Act of Quebec. The principal arguments advanced in support of this application are, 1st. That the Province of Quebec had no power to pass the license Act in Her Majesty's name. 2nd. That the Act in question imposes as penalties fines in addition to imprisonment. 3rd. That the said Act is ultra vires inasmuch as it affects trade and imposes a tax on the business of the appellants, which is not subject to any provincial license.

The first objection, that the legislature had no power to enact laws in the name of Her Majesty has been abandoned. On the second which denies the power of [265] the legislature to impose penalties of fine and imprisonment at the same time, I concur entirely in the opinion expressed by Mr. Justice Cross—sub-sect. 15 of sect. 92 of the B. N. A. Act—giving power to punish by fine, penalty or imprisonment, has given the power to impose these punishments together as well as to impose them separately. The reasons of the learned judge in

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(1) See p. 436 *et seq.*

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support of this proposition seem to me conclusive, and I confine myself to a reference thereto

As to the constitutionality of the license Act 1878, which has been so often before the courts during the last few years, that question must be considered as finally settled by the special case submitted to this court under the provisions of the Act 47 Vict. c. 32, (1) and afterwards carried by appeal to the Privy Council. (2) The

(1) Cassels' Digest 279 ; Dominion Sessional Papers of 1885, vol. 18, No. 12, Paper 85a.

(2) [The report of the Judicial Committee of the Privy Council on the special case was approved on the 12th of December, 1885, by the following Order in Council :

"Whereas there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 21st of November last past, in the words following, viz. :—

" 'Your Majesty having been pleased by Your Order in Council of the 19th of May last past, to refer unto this Committee the humble Petition of the Most Honorable Henry Charles Keith Petty Fitzmaurice, Marquis of Lansdowne, Governor-General of the Dominion of Canada, humbly praying that a special case and the decision of the Supreme Court of Canada upon the same, with reference to the competence of the Canadian Parliament to pass the Acts 46 Victoria, cap. 30 and 47 Victoria, cap. 32 in whole or in part, may be referred by Your Majesty to this Committee to report thereon the Lords of the Committee in obedience to Your Majesty's Special Order of Reference, have taken the said humble Petition into consideration and having heard counsel thereupon for the Dominion of Canada and likewise for the

Lieutenant-Governors of the respective Provinces of Ontario, Quebec, Nova Scotia and New Brunswick and having been attended by the agents for the Province of British Columbia, their Lordships do this day agree humbly to report to Your Majesty as their opinion in reply to the two Questions which have been referred to them by Your Majesty, that the Liquor License Act 1883 and the Act of 1884 amending the same are not within the legislative authority of the Parliament of Canada. The provisions relating to adulteration, if separated in their operation from the rest of the Acts would be within the authority of the Parliament, but as in their Lordships' opinion they cannot be so separated, their Lordships are not prepared to report to Your Majesty that any part of these Acts is within such authority."

" Her Majesty having taken the said report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order accordingly. Whereof the Governor-General of the Dominion of Canada, the Commander in Chief and the Lieutenant-Governors of the respective Provinces of the Dominion for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."]

decision on that question is now the law on this point. It is no longer possible to question the exclusive powers of the legislatures to make laws regulating licenses for the sale of intoxicating liquors, nor as to the constitutionality of the license Act of Quebec of 1878. This latter question was before this court in the case of *The Corporation of Three Rivers v. Sulte*; (1) and the validity of the law was there recognised.

Inasmuch as this Act by sect. 196 gave complete jurisdiction to the Court of Special Sessions of the Peace, to hear and dispose of the prosecution instituted therein, against the said Ryan, there can be no ground for the issue of a writ of prohibition to restrain that court from exercising its jurisdiction.

The appeal must be dismissed with costs.

HENRY, J:—

[The judgment of the learned judge is omitted as it is occupied wholly in considering whether the writ of prohibition was applicable to the circumstances of the case. The learned judge was of opinion that there was no justification for the issue of the writ.]

TASCHEREAU, J :—

Upon the question of prohibition I dissent from the majority of the court, and I think with the court below that the writ of prohibition lies in such a case as the present. It will be remarked that although the judgment of the Court of Queen's Bench is reversed on the question of prohibition, yet the appellant fails on his appeal.

On the merits of the case, the majority of the court being of opinion that no writ of prohibition lies in the

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(1) 11 Can. S.C.R. 25; ante p. 305.

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present case, it is useless for me and I think wrong to express an opinion, as what I would say about it would be merely obiter dictum.

GWYNNE, J :—

[269] The questions involved in this case are :

1. As to the procedure by writ of prohibition according to the law prevailing in the Province of Quebec; and

2. As to the proper determination, upon the merits, of the issue joined in the proceedings in prohibition, this latter question depending upon the validity and construction of an Act of the legislature of the Province.

[The learned judge after considering the question of procedure in prohibition, continued, p. 281]:

1. Now in the case before us the questions raised by the issue joined in the proceeding in prohibition are :—

1. Does the Quebec License Act of 1878 and its amendments impose any obligation upon brewers duly licensed as such by the Dominion Government to carry on the trade of brewers in the Province of Quebec, to take out any, and if any, what license required by such the [282] Quebec License Acts to entitle the brewers to dispose of the subject of their trade and of their manufacture within the said province?

2. If the provincial statute does impose such obligation, is the statute, quoad the imposition of such obligation, intra vires of the Provincial Legislature? and

3. Is the sale and delivery by brewers in the city of Montreal, through the agency of their draymen, of the beer manufactured by them to their customers at the dwelling houses or places of business of the latter, under the circumstances appearing in the proceedings in prohibition here, an infringement of the Quebec License Act of

1878, subjecting the brewers' drayman to the penalty imposed by the 71st or any other section of such license Act? Every one of these questions must be answered in the affirmative to give to the police magistrate in the city of Montreal jurisdiction over the act complained of and the person charged with having committed it. And these questions were, by the procedure of the Province of Quebec in prohibition cases, as much before the Superior Court for its determination as they would have been before the Superior Court in England if, as in *Gould v. Gapper* (1), the parties applying for a writ of prohibition had been ordered to declare, and had declared in prohibition, and issues had been joined thereon for the express purpose of obtaining the judgment of the Superior Court upon the questions, which, in the present case, equally as in *Gould v. Gapper* (1), involved the construction of the statute in virtue of which the inferior court could only have had, if it had, any jurisdiction over the subject matter or the person who had done the act complained of.

The manner in which the Superior Court dealt with these issues so joined in a proceeding duly instituted according to the course and practice of the court was this: It adjudged the Quebec License Act in question to be [283] intra vires of the Provincial Legislature, but declined to adjudicate upon the questions whether it did or not impose any obligation upon brewers duly licensed as such by the Dominion Government under the Dominion Act, 43 Vict. c. 19, to take out any, and if any, what license from the Provincial Government to entitle them to dispose of the subject of their trade manufactured by them; or whether the sale and delivery by Messrs. Molson & Brothers through the agency of their drayman of the beer manufactured by the ", to their customers at the dwell-

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ing houses or places of business of the latter under the circumstances appearing in the proceedings in prohibition, was an infringement of the Quebec License Act of 1878 and its amendments, subjecting their drayman Ryan to the penalty imposed by sect. 71 of the said Act.

The learned judge presiding in the Superior Court referred these questions to the police magistrate; thereby submitting in effect to the court of inferior jurisdiction the determination of the issues joined in a proceeding duly instituted in the Superior Court, intimating, as a reason for so doing, that the petitioner Ryan, if condemned in the inferior court, might then apply to the Superior Court by writ of certiorari. But the writ of certiorari is a mode merely of informing the court of the particulars of the question brought up by that writ for its decision and it only issues after judgment, while we have already seen it is the inalienable right of the superior courts of common law to entertain and decide all questions affecting the jurisdiction of the courts of common law of inferior, and indeed of all courts of special limited jurisdiction, by proceedings in prohibition, at whatever stage the proceedings in the inferior court may be. And when issue is joined in proceedings in prohibition duly instituted, as [284] they have been here, the court in which they have been so instituted becomes so seized of the issues that it is the inalienable right of the litigants to have judgment upon these issues rendered by the court, and in the proceeding in which the issues are joined. That the Superior Court therefore has erred in the judgment rendered by it, whatever may be the proper judgment to be rendered upon the questions raised, cannot, I think, admit of a doubt. Upon appeal to the Court of Queen's Bench at Montreal in appeal that court dismissed the appeal, a majority of the learned judges of that court against two

dissentients, holding that although the proceedings in prohibition were duly instituted, the judgment of the Superior Court which declined adjudicating upon the issues joined therein is free from error. In support of this judgment, the case of *The Charkieh*, (1) decided in the Court of Queen's Bench in England, is relied upon, but a reference to that case will show that it is not at all analogous to the present case.

[The learned judge after considering the case of *The Charkieh*, (1) and considering that no analogy existed between that case and the present, continued, p. 287]:

The case must therefore now be dealt with upon its merits.

If the provisions of the Quebec License Act now under consideration are identical with the provisions of the Ontario Act, 37 Vict. c. 32, in respect of the point in question we must be bound by the judgment of this court in *Severn v. The Queen* (2) which is no more at variance with the judgments rendered in *Russell v. The Queen* (3); *Hodge v. The Queen* (4); *In the matter of the Acts of the Dominion Parliament*, 46 Vict. c. 30 and 47 Vict. c. 32 (5), and *Sulte v. The Corporation of Three Rivers* (6), than were those judgments at variance, as they were at one time erroneously supposed to be, with the judgment in *The City of Fredericton v. The Queen* (7). All of those judgments rest upon the foundation that laws which make, or which empower municipal institutions to make, regulations for granting licenses for the sale of intoxicating liquors in taverns, shops, etc., and for the good government of the taverns and shops so licensed, and for

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(1) L. R. 8 Q. B. 197.

(2) 2 Can. S. C. R. 70; ante vol. 1, p. 414.

(3) 7 App. Cas. 829; ante vol. 2, p. 12.

(4) 9 App. Cas. 117; ante vol. 3, p. 144.

(5) Cassels' Digest, 279; Dominion Sessional Papers of 1885, vol. 18, No. 12, Paper 85a.

(6) 11 Can. S. C. R. 25; ante p. 305.

(7) 3 Can. S. C. R. 505; ante vol. 2, p. 27.

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the preservation of peace and public decency in the municipalities, and for the repression of drunkenness, and disorderly and riotous conduct, and imposing penalties for the infraction of such regulations, are laws which, as dealing with subjects of a purely local, municipal, private and domestic character, are intra vires of the Provincial Legislature. But *Severn v. The Queen* (1) proceeded wholly upon the construction of item 9 of sect. 92 of the British North America Act, and in that case the late learned chief justice of this court, Sir William B. Richards, held, and a majority of this court concurred with him, that the obligation imposed by the Ontario Act, 37 Vict. c. 32, upon brewers to take out a provincial license to enable them, to dispose of the beer manufactured by them was in effect an obligation in restraint of the manufacturing by them of the article of their trade, which in virtue of a license from the Dominion Government, issued upon the authority of an Act of the Dominion Parliament, they were authorized to carry on, and that the item 9 of sect. 92 of the British North America Act did not authorize the Provincial Legislatures to impose any such obligations upon brewers. That the words "and other licenses" in that item in connection with the preceding words, "shop, saloon, tavern, auctioneer" must be construed, having regard to the general scope of the scheme of confederation, as referring to licenses ejusdem generis with the preceding licenses spoken of in the item, such as licenses on billiard tables, victualling houses, houses where fruit, etc., are sold, hawkers, peddlers, livery stables, intelligence offices, and such like matters of purely municipal character, and that those words could not consistently with a due regard to the intent of the framers of the scheme of confederation, as appearing in the British North America Act, be construed as giving to the Provincial Legislatures power to put a restraint upon the

(1) 2 Can. S.C.R. 70; *ante* vol. 1, p. 414.

manufacture of an article of a trade authorized to be carried on by an Act of the Dominion Parliament. So understanding the judgment in *Severn v. The Queen* (1), whether it be in point of law, sound or otherwise, it may well stand consistently with, and is not shaken by *Russell v. The Queen* (2), or any other of the above cases, [289] and it is still a judgment binding upon this court and all courts in this Dominion. But the question still remains to be considered, namely, whether the provisions of the Quebec License Act of 1878 are, upon the point under consideration, so identical with the provisions of the Ontario Act as to make the judgment in *Severn v. The Queen* (1) applicable in the determination of the present case. The two Acts when compared appear to be very different, and so great is this difference as regards the point under consideration as to convey to my mind the idea that the draftsman of the Quebec Act of 1878, framed it with the object of complying with the judgment in *Severn v. The Queen* (1), which had been rendered five or six weeks before the passing of the Act, and to avoid its being open to the objection of ultra vires, which that judgment had pronounced the Ontario Act to be open to. The Ontario Act, while professing to have no intention to interfere with any brewer, distiller or other person duly licensed by the Government of Canada for the manufacture of spirituous liquors, in the manufacturing such liquors, did nevertheless in effect do so by enacting that to enable any such brewer, distiller, etc., to sell the liquor manufactured for consumption within the Province of Ontario, he should first obtain a license to sell by wholesale under sect. 4 of the Act. The "license by wholesale," and which brewers were thus required to take out, was a license to sell in quantities not less than five gallons in each cask or vessel at any one time, or in not less than

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(1) 2 Can. S. C. R. 70; ante vol. 1,
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(2) 7 App. Cas. 829; ante vol. 2,
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one dozen bottles of at least three half pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time, *in any other place than inns, ale or beer houses, or other places of public entertainment*, and the Act imposed a penalty upon brewers and distillers in case they should sell the liquor manufactured by them respectively without taking out such wholesale license.

Now the Quebec Act of 1878 and its amendments [290] contain no provision of such or the like nature as that in the Ontario Act upon which the judgment in *Severn v. The Queen* (1) proceeded, and when we refer to the Act in virtue of which license fees or duties had been collected from brewers in the Province of Quebec before the judgment in *Severn v. The Queen* (1), which license fees, as appears in the pleadings and admissions in the case now before us, were refunded by the Provincial Government in consequence of, and in submission to, that judgment, we find that the only authority under which such license fees so refunded had been collected was contained in sects. 12, 13 and 14 of 36 Vict. c. 3 as amended by 37 Vict. c. 3, and that there is no similar enactment or provision contained in the Act of 1878 or its amendments, while that Act repeals all the previous Acts; a fact which seems to confirm the view I have taken, that it was the intention of the Provincial Legislature in passing the license Act of 1878 to comply with the judgment of this court in *Severn v. The Queen* (1).

There is no such license as the "wholesale license" of 36 Vict. c. 3, required to be taken out by the Act of 1878 or its amendments. All the licenses (as regards the sale of intoxicating liquors) which the license Act of 1878 as amended requires to be taken out are licenses:—

1. To keep an inn and for the sale of intoxicating liquors therein. The word "inn" being defined to be a house of entertainment, wherein intoxicating liquors are sold.

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(1) 2 Can. S. O. R. 70; ante vol. 1, p. 414.

2. For the sale of intoxicating liquors in a club.
3. For the sale of intoxicating liquors in a restaurant or railway buffet.
4. For a steamboat bar—for the sale therein of intoxicating liquors.
5. For the sale of intoxicating liquors at the mines or in any mining district or division.
- [291] 6. A retail liquor shop license.
7. A wholesale liquor shop license, and
8. A license to sell for medicinal purposes or for use in divine worship in municipalities in which a prohibitory by-law is in force.

Now by 43-44 Vict. c. 11, a wholesale liquor shop is that wherein is sold at one time intoxicating liquors in quantities not less than two gallons imperial, or one dozen bottles of not less than one pint imperial measure, each; and a retail liquor shop is defined to be that wherein are sold at any one time intoxicating liquors in quantities not less than one pint imperial measure. Now those licenses are required to be taken out for the sole purpose of enabling the Provincial Government to raise a revenue for the purpose of the province. That this must be held to be the sole object of the Quebec License Act of 1878 and its amendments, appears not only from item 9 of sect. 92 of the British North America Act, but from an Act of the Provincial Legislature, 46 Vict. c. 5, passed for the express purpose of remedying what the Legislature conceived to be a defect by reason of its not being so stated in the Acts of 1878 and 1880. By this Act, 46 Vict., it is declared:—

“That the duties payable for licenses imposed by section 63 of the Quebec License Law of 1878, as replaced by section 17 of the Act, 43-44 Vict. c. 11, were so im-

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posed in order to the raising of a revenue for the purposes of this province under the powers conferred upon the Legislature of this Province by the 9th paragraph of sect. 92 of the British North America Act of 1867."

Now the Provincial Government cannot, under the Acts in question, raise any revenue by the issue of any licenses other than those expressly named in the Acts as subjected to duty, and a person not engaged in a business which by the Acts or one of them is subjected to a license tax, cannot be compelled to take out, and consequently cannot be punished for not taking out, one of the licenses [292] upon which a duty or tax is imposed by the Acts. In order to raise a revenue by taxation of any kind, the thing to be taxed must be expressly stated in the Act imposing the tax. But none of the licenses named in the Acts relate to the business of a brewer. His business is to manufacture beer and to sell the beer manufactured by him. The Acts impose no tax upon his business, he cannot, therefore, be compelled to contribute to the provincial revenue by taking out, nor can he be punished for not taking out, a license authorizing him to keep an inn, a restaurant or railway buffet, a steamboat bar or a retail or wholesale liquor shop, none of which nor all of them together, if taken out, would enable him to carry on the business of a brewer or authorize him to dispose of the article manufactured by him. The Messrs. Molson & Brothers, although they should be possessed of every one of the above-named licenses, would be as liable for the act which is the subject of prosecution in the inferior court now under consideration, as they are now not having any of such licenses. Brewers, therefore, are not required by the Act in question, in order to carry on their business, to take out any of the licenses which, for the purpose of raising a revenue, are subjected to a fee or tax.

The intervenant in his pleading in intervention contends that admitting that the said Molson & Brothers are entitled, in virtue of their license from the Dominion Government, to sell the beer of their manufacture without any other license, still Andrew Ryan had no right to hawk or peddle the beer through the city of Montreal, and to sell it outside of the premises of the said brewers without being supplied with the license required by the Quebec License Act, and that moreover the Messrs. Molson & Brothers themselves had no right to sell their beer outside of their premises without a license of the Province of Quebec, but as brewers are not, nor is their business, taxed by the Acts in question, and they are not required by any of the Acts to take out a license from the Provincial Government to enable them to carry on their trade, and as none of the licenses, which are by the Acts subjected to a tax or duty, would give them any greater authority to sell their beer on the premises where it is manufactured any more than elsewhere, they must have the same right to sell and deliver the beer manufactured by them at the residences or places of business of their customers whether they be licensed inn, restaurant or steamboat, barkeepers or others equally as at the premises where the beer is manufactured, unless the provision in the Acts as to peddlers' license applies, which is the only license which can be referred to in the pleadings in intervention; but apart from the absurdity of brewers by delivering their beer to their customers at their residences or places of business being deemed to be peddlers, the Act expressly provides that no person is obliged to take out a license to peddle and sell goods, wares, etc., of their own manufacture excepting drugs, medicines and patent remedies whether peddled and sold by himself or his agents or servants.

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Mr. Geoffrion, however, contended that although none of the licenses named in the Act authorized to be done the act which is the subject of the prosecution instituted against Ryan, nevertheless the penalty sought to be recovered is exigible ; but the object of imposing a penalty is to prevent the revenue being defrauded by a party doing without a license that, for doing which the Act has required a license to be taken out, upon which, for the purposes of revenue, a tax is imposed. Accordingly the provincial statute, 46 Vict. c. 5, already referred to, and which was passed, as stated in the preamble, because doubts had arisen as to the constitutionality of certain provisions contained in the Quebec License Act of 1878 and the amendments thereto, and that it was expedient [294] to make such provision as would ensure the collection of the revenue derivable from the duties imposed and payable for the different licenses specified in the above-mentioned Act as amended ; and which, to remove the above doubts, declared that the duties payable for licenses imposed by the Quebec License Act of 1878 as amended by the Act of 1880 were imposed in order to the raising of a revenue for the purposes of the Province, enacted that :—

“ Any person neglecting or refusing to pay the license duty payable by him shall be liable for such neglect or refusal to a fine equal to the amount of such duty and one-half of such amount added thereto.”

Now this provision (although in a statute passed since the prosecution in the present case was instituted, still as the statute was passed for the purpose of declaring the intent of the Act of 1878 and its amendments) throws much light if such were necessary upon the construction to be put upon the 71st clause of the Act of 1878, under which the prosecution in the present case was instituted

for the persons who are subjected to penalties for infringing an Act passed for the purpose of raising a revenue for the use of the province by the imposition of a tax upon certain licenses are, by legislative declaration, shown to be those only who neglect or refuse to pay the license duty payable by them respectively ; now these must be persons who assume to do some or one of the acts for the doing of which the statute has required a license to be taken out upon which a specific duty has been imposed. The doing anything for the doing of which there is no license specified in the Act, nor any duty imposed, can never be held to be an infringement of the Act.

Section 71 of the Act of 1878, as amended by the Act of 1880, enacts that :—

“ Any one who keeps, without a license to that effect still in force as hereinabove prescribed, an inn, restaurant, steamboat bar, railway buffet or liquor shop for the sale by wholesale or retail of intoxicating liquors, or sells in any quantity whatsoever intoxicating liquors in any part whatsoever of this province, municipally organized, is liable, for each contravention, to a fine of \$95, if such [295] contravention takes place in the city of Montreal, and \$75 if it has been committed in any other part of the organized territory ; and if the contravention takes place in non-organized territory the penalty is \$35—any one who keeps without a license to that effect still in force as by law prescribed a temperance hotel is liable for each contravention to a fine of \$20.”

Now in view of the object of the Act being to raise a revenue for the purposes of the Province by a tax upon certain licenses particularly specified in the Act, required to be taken out for the doing certain things mentioned in such licenses respectively, the plain construction of the above section is that any person who, in any part of the Province of Quebec which is municipally organized, shall, in contravention of the Act, do any of those things enu-

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merated in the section as only authorized to be done under a license as in the Act prescribed, without the license as prescribed by the Act appropriate to the things done shall be liable, etc. ; and if the contravention takes place in non-organized territory the penalty is \$35.

There can be no contravention of the Act unless the thing done is a thing for the doing which one of the licenses particularly specified in the Act upon which a duty is imposed is required to be taken out. If there be no license specified in the Act for authorizing to be done the thing complained of, the doing such thing is no contravention of the Act, and there being no license specified in the Act for the doing what Ryan has been prosecuted for doing, neither he nor the Messrs. Molson & Brothers, whose servant only Ryan was in doing what is complained of, is so liable to any prosecution as for an infringement of the Act. The Act, in fact, imposes no obligation upon brewers to take out any license to enable them to dispose of the beer manufactured by them, which is the simple character of the act complained of; in this respect it differs in its frame, and, as it appears to me, designedly, from the Ontario Act, which was under consideration in [296] *Severn v. The Queen* (1), but as it imposes no tax upon brewers disposing of the beer manufactured in the manner complained of, the inferior court had no jurisdiction in the matter of the prosecution instituted against the Messrs. Molson & Brothers' drayman, and the prohibition should be ordered to be issued from the Superior Court absolutely as prayed for with costs to the petitioners in all the courts.

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(1) 2 Can. S. C. R. 70, *ante*, vol. 1, p. 414.

## JUDGMENTS IN QUEBEC COURT OF Q.B.—APPEAL SIDE.

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[*Reported M. L. R. 2 Q. B. 381.*]

CROSS, J:—

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William Busby Lambe, inspector of licenses for the revenue district of Montreal, prosecuted Andrew Ryan, of the city of Montreal, before the Court of Special Sessions of the Peace at Montreal, presided over by Mathias C. Desnoyers, Esq., Police Magistrate, for having, on the 6th of June, 1882, sold intoxicating liquor in the city of Montreal, without having obtained a license from the Provincial Government authorising such sale.

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Ryan pleaded that in what he did he had acted as the employee of J. H. R. Molson & Bros., a firm of brewers, who had carried on business as such for upwards of eighty years in the city of Montreal, and whose custom it had always been, as on the present occasion, to send out their employees and draymen to sell and deliver beer to their customers, to which no objection had ever been made up to that time; that said J. H. R. Molson & Bros. were duly licensed under the Dominion Inland Revenue Act, to carry on their said business of brewers and that he, Ryan, was not guilty of the complaint made against him.

The case went to trial before the presiding Judge of the Sessions, who, after evidence taken and the parties heard, took it under advisement.

Thereupon the said J. H. R. Molson & Bros. and the said Andrew Ryan, the now appellants, on the 10th November, 1882, caused a writ of prohibition to issue out of the Superior Court at Montreal, enjoining the Judge of the Sessions from further proceedings upon the complaint of the now respondent.

In their petition for the prohibition they set forth the same facts pleaded by Andrew Ryan, and further, that the Judge of the Sessions had no jurisdiction to try Ryan for the pretended offence for which he was charged, nor to take up nor hear the case, and that, for the reasons stated in their petition which were given seriatim under eight heads, and which may be summarized as follows:—

The first three heads of objection had reference to the form adopted for passing the enactments of the Provincial Legislature, proceeding as it does in the name of Her Majesty, which has been criticised as unauthorized by the terms of the B.N.A. Act.

4th. The Act purported to treat of criminal procedure.

5th. The penal clause in the Act was by fine and imprisonment.

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The 6th and 7th set forth and claimed the right to carry on the business of brewers and to sell their beer in virtue of the Dominion license ; and the 8th denied any right in the Legislature of the Province to limit or interfere with the traffic of brewers licensed by the Dominion Government.

The respondent in his quality of license inspector, intervened to [391] resist the prohibition, and by his contestation thereof claimed : That the Quebec license law was constitutional as well as its amendments, and that particularly as regards the acts of Ryan ; that if even J. H. R. Molson & Bros. had the right to sell their beer, Ryan had no such right, nor could J. H. R. Molson & Bros. have any right to sell outside their premises without a provincial license.

The appellants had put of record the Dominion license relied upon by them, and on the contest raised on the prohibition, the parties agreed on the following admissions :—

1. That J. H. R. Molson & Bros. were brewers, having carried on business as such for a number of years in Montreal, holding a license from the Dominion Government under the Dominion Act, 43 Vict. cap. 19, intituled " The Inland Revenue Act of 1880."

2. At the time of the alleged offence, Ryan was in the employ of J. H. R. Molson & Bros., as drayman, receiving a monthly salary or wages by a commission on the moneys he collected for the sale of beer manufactured by J. H. R. Molson & Bros.

3. The sale made by him was so made outside the business premises of J. H. R. Molson & Bros. and to a buyer who had not given his order at their office, but was within the revenue district of Montreal.

4. It had been the immemorial usage in Montreal for draymen employed by brewers to sell beer in the same manner without a provincial license.

5. That the local Legislature of Quebec had refunded to brewers licensed by the Dominion Government the amount of the license fee imposed by the Act of the local Legislature upon such brewers, owing to and after the decision in the case of *Severn v. The Queen*, (1) decided in the Supreme Court of Canada at Ottawa.

On the above issue and admissions, the case went to judgment in the Superior Court, and that tribunal, by the judgment now ap- [392] pealed from, held that the Quebec License Act was constitutional, that the Court of Special Sessions of the Peace, and the judge

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(1) 2 Can. S.C.R., 70 ; *ante* vol. 1, p. 414.

thereof, had jurisdiction over the complaint made against Ryan, and that if aggrieved, the appellants were not without remedy which they might have exercised by certiorari. That Court consequently dismissed the petition of the appellants for prohibition.

We are now asked to revise this decision of the Superior Court.

A preliminary question arises, as to whether prohibition is a remedy applicable to the case. This objection was but little pressed at the argument, nor is such technical objection generally viewed with much favour when it appears that a clear right is involved. A certiorari would not have been efficacious, as admissions of facts on the prohibition issue had to be put of record to have the merits of the case submitted. I think the prohibition was a suitable proceeding and the judges of this Court were unanimously of this opinion.

The first three enumerated reasons of the appellants in support of their petition were not specially urged at the argument. I do not think there is any substance in them. Whether or not the appellants are correct in their criticism of the form adopted by the local Legislature in passing these enactments, and however pretentious it may seem for them to act in the name of Her Majesty if such was not intended by the B.N.A. Act, on which I do not pretend to pronounce an opinion; it seems to me sufficiently clear by the form adopted that evidence is given of the assent of all the authorities in whom legislative power is vested. It contains all the essentials of a valid legislative act, and the courts are bound by it. I think I am warranted in saying that none of the judges are prepared to hold that the Act is invalid from the causes referred to.

The fourth enumerated reason can scarcely be considered serious, and as regards the fifth, it should be considered settled by the decision of the Privy Council in the case of *Hodge v. The Queen* (1). Doubts have indeed been suggested as to whether the point was fairly raised in that case, and, consequently, whether the dictum therein held by the Privy Council on the subject should be received as a final ruling. I must say that it has always seemed to me that the No. 15 of sect. 92 of the B.N.A. Act, giving the power of punishment by fine, penalty or imprisonment, conferred the right to cumulate, as well as to distribute such punishments in the manner and to the extent that the body empowered should deem expedient; that an Act conferring power on a legislative body should be construed liberally and not as a law imposing a punishment for a penal offence; that in giving a construction to the details, a view

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(1) 9 App. Cas. 117; ante vol. 3, p. 144.

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of the entire subject should be borne in mind ; that the object the legislature must have had in view was the distribution of powers, plenary in their nature, between two bodies who should each have full exercise of the authority to them respectively attributed. It was not the case of a supreme legislature giving limited authority to a subordinate administrative tribunal, supposed, therefore, to retain all the power not specifically or in exact terms conferred. It was a case where every reasonable incident to the power conferred was presumed to pass with the concession of the power. The alternate language of fine, penalty or imprisonment may, therefore, be fairly read conjunctively as well as disjunctively, as occasion might call for its application. There was no policy or object, and it could not have been the intention of the legislative power in such a case to hamper or embarrass the concession by limits of no advantage to the grantors, nor of any benefit to the other grantees, nor was it professed that any limitation of power in regard to the matter in question passed to the other grantees or remained with the grantors.

The following enumerated reasons raise the questions principally relied on in the case. As regards the sixth and seventh, I consider [394] we are bound by the ruling of the Supreme Court in the case of *Severn v. The Queen* (1) wherein it was held that a brewer, being licensed under the Dominion Inland Revenue Act, 31 Vict., cap. 8, could lawfully manufacture and sell beer, without obtaining a license from the Dominion [sic.] Government ; that the prohibitory Provincial Act of the Province of Ontario, similar to the one now in question, was ultra vires ; that the licenses required by such Act were in restraint of trade and in excess of the power of the local Legislature, nor was such power conferred by sub-sect. 9 of sect. 92 of the B. N. A. Act. It seems to me that this precedent covers and meets the present case. Whether we measure it by the extent of power possessed by the Dominion Legislature, as being entitled exclusively to regulate trade and commerce, or as vested with power in all matters not coming within the subjects assigned exclusively to the legislatures of the Provinces ; or measure it by the absence of any control of the Provincial Legislature, we in either case alike must come to the conclusion that the sale of beer by Ryan, as effected in this case, could not be prohibited by the local Legislature. The extent of the power of the Provincial Legislature over the subject matter, exclusively of its being involved in municipal institutions, in respect of which there is no question in this

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(1) 2 Can. S.C.R. 70 ; *ante* vol. 1 p. 414.

case, is measured by No. 9 of sect. 92 of the B.N.A. Act, assigning to the Provincial Legislatures, shop, saloon, tavern and other licenses not extending to such as brewers' licenses, as already distinctly decided, and certainly not extending to a general prohibition of the sale of intoxicating liquor in any quantity or in any place whatsoever, as provided for by sect. 71 of the Quebec License Act of 1878, 41 Vict. cap. 8, under which alone, Ryan was or could be prosecuted, which provision, being clearly in restraint of trade, and unauthorized by any provision of the B.N.A. Act, must be held ultra vires and void. It is objected that the dominion license only authorized the carrying on the business of brewer in the business premises of J. H. R. Molson & Bros. and that the complaint [395] against Ryan was for sales made without the limits of these premises. It is quite true that the license is to carry on the business of a brewer within the specified premises of J. H. R. Molson & Bros., but that is meant for the manufacture, and not for the sale of the beer. The law, sect. 22, requires the license to issue for the place or premises specified in the application, and for such place or premises only. The reason of this is obvious: were it not so, any brewer, obtaining a single license, could establish breweries all over the Dominion, but the same reason does not hold with reference to the sale of the manufactured article. A right to manufacture implies a right to sell the produce of the manufacture, and no restraint is imposed on such sale, either at the brewery or elsewhere; and if it were it could only be validly done by Act of the Dominion Legislature, and no complaint is here made of the violation of any such Act.

As regards the power of the Provincial Legislature, raised especially by No. 9 of the enumerated reasons in support of the prohibition, there is no question of its exercise in this instance being for local or municipal purposes, and its authority over shop, saloon, tavern, auctioneer and other licenses could not possibly entitle that Legislature to enact, as it has done by sect. 71 of the Statute of Quebec, 41 Vict., c. 8, a general prohibition of the sale of intoxicating liquors in any quantity whatsoever, in any part of the Province whatsoever; and this is the only prohibition in the whole statute to which the act of Ryan could apply as an infraction. It is clearly an attempt to restrain trade beyond their powers and invalid. Whatever authority they might be supposed to possess as a municipal or police regulation, or to restrict the distribution or sale of intoxicating drinks in shops, saloons, taverns or other localities, could not lawfully extend to such general prohibition as they have attempted. I am therefore of opinion that the judgment

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out that at the time of confederation it was not an offence to deliver skimmed milk without revealing the fact.

48 Vict. c. 67, (D.) passed in 1886, seems to have been the first general Act. Of course, if a man sold skimmed milk asserting it to be unskimmed he might be charged with obtaining its price on that false pretence.

The conviction here is for wilfully bringing the milk from which the cream had been abstracted without notifying the owner or manager, etc. etc.

We are not very distinctly told the precise way in which the persons bringing milk to the factory are remunerated. The article they bring is to be manufactured into cheese. Whether the bringer is to be ultimately remunerated by so much cheese or by money after realization of net profits of sale or otherwise does not appear. But as the case is presented to us, I do not see how the defendant's alleged offence could be easily reached under the Adulteration Act, which seems aimed at the seller of goods in the ordinary dealings of vendor and purchaser.

I am not satisfied that this was milk "sold or offered or exposed for sale" in the sense of that statute, nor can I believe that the existence of such a general Act must prevent the local Legislature from regulating the dealings between these cheese factories and their patrons or customers in such a special manner as this Act provides. The industry sought to be regulated is one of vast and increasing importance, and it may be important to its interests to have special local legislation to meet its requirements.

The regulations prescribe that the bringer in of skimmed milk must give a written notice that it has been so skimmed. This is a special provision. So also as to keeping back the "strippings." (Sect. 2.)

Then power is given to the manager (sect. 5) to compel inspection and submission of cows to a milk test and there are other provisions specially adapted to insuring fair dealing in this particular business.

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the statute, in any quantity whatsoever, intoxicating liquora, must take out a license, and failing to do so, is liable to a fine of \$95 for each contravention.

Now this brings us back to the old question raised in *Attorney-General for Quebec v. The Queen Insurance Co.*, (1) which might have been decided in the Privy Council, but which was not there decided. Their Lordships held with us, that the tax in that case was not direct taxation within the meaning of the B. N. A. Act. The majority of the Court here held that the license sought to be imposed was not a license ejusdem generis as those mentioned in the sub-sect. 9, sect. 92 of the B. N. A. Act, 1867. The Privy Council held on this point that it was a stamp Act and not a license Act, because there was no penalty for the infraction, and because the payment was not a permit to do, but an impost on the thing done.

It is not necessary now to re-discuss whether or not these are the true tests of what constitutes a license, for in the case before us all these elements exist. There is the general power to do, instead of the impost on a thing done, and there is a penalty for selling without having taken out a license. Of course, if *Serern v. The Queen* (2) is to govern, we must reverse, for the Court there distinctly held that a brewer's business, the very case now before us, could not be taxed under guise of a license by a local Act.

It must, however, be remembered that this case is not of the highest authority. The present Chief Justice and Mr. Justice Strong dissented, and there was much judicial authority the other [398] way. The Supreme Court is not a final Court of Appeal, and the majority of this Court has since refused to be governed by that decision in the tax cases now before the Privy Council, and unanimously in *Hamilton Powder Co. v. Lambe*, (3) also in appeal before the Privy Council. In addition to this the question of liquor licenses has been subject to curious vicissitudes, and the reasoning of the majority of the Supreme Court hardly seems to have prevailed, at least so they have intimated. In a recent case, the Privy Council has intimated that the object of the law might determine its constitutionality. Thus, in *Russell v. The Queen*, (4) the object of the statute being the general order and good government of Canada, it was declared to be constitutional; while in

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(1) 3 App. Cas. 1090; ante vol. 1, p. 117.

(2) 2 Can. S. C. R. 70; ante vol. 1, p. 414.

(3) M. L. R., 1 Q. B. 460.

(4) 7 App. Cas. 829; ante vol. 2, p. 12.

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*Hodge v. The Queen*, (1) the object of the law being municipal institutions in a province, the statute was likewise declared to be constitutional. We have also admitted this principle in *Sulte v. Three Rivers*, (2) and that decision was confirmed in the Supreme Court. (3) We are not, therefore, I think, disturbing hierarchical authority in disregarding an isolated judgment so compromised as that in *Severn v. The Queen* (4).

The present case is not one coming under sub-sect. 8, sect. 92. It has nothing to do with municipal institutions. It is simply a question of the right to tax by the Government of Quebec. If it can be defended at all, it is under sub-sect. 9, sect. 92. It is an impost by way of license for the purpose of raising revenue on what is admitted to be the ordinary trade of a brewer. This, I think, is constitutional, when it is fairly imposed, that is, when it appears that there is no fraudulent use of the B. N. A. Act. If it appeared that the local Act was only nominally legislating for the purposes of raising a revenue, and that the statute really was contrived as a prohibitory measure, another consideration might, perhaps, come in. I only allude to this as a precaution, for there is no suggestion of any misuse of the legislative power, and I am not aware that the use of the legislative power to get round the constitutional Act has, as yet, been formally insisted upon as deciding as to the constitutionality of an Act, although it has been suggested that a case might occur in which that point would have to be considered—*The Colonial Building and Investment Association v. The Attorney-General* (5). It seems, however, to be a necessary consequence of deciding from the object of the law, that the Courts must see whether the object is real or delusive.

I think this case must follow the decision in the tax cases and in the case of *Hamilton Powder Company v. Lambe* (6) until the Privy Council decides that the only licenses the local Legislature shall require to be taken out, in order to raise a revenue, are those specially mentioned in sub-sect. 9, sect. 92, and that the words, "and other licenses" have no meaning; or, that their meaning is to be restricted to licenses ejusdem generis as those especially enumerated, and furthermore in the later case how we are to recognize the composite order which, including shops, saloons,

(1) 9 App. Cas. 117; ante vol. 3, p. 144.

(2) 5 Legal News 330; ante vol. 2, p. 280.

(3) 11 Can. S. C. R. 25; ante p. 305.

(4) 2 Can. S. C. R. 70; ante vol. 1, p. 414.

(5) 9 App. Cas. 157; ante vol. 3, p. 118.

(6) M. L. R. 1 Q. B. 460.

taverns and auctioneers, excludes brewers selling their beer, wholesale or retail. In making this distinction, it cannot be overlooked that the auctioneer sells in a small way, and he also makes sales which cannot be separated from the operations of trade and commerce. Mr. Molson might have sold his beer by an auctioneer, and if so, his beer would have paid toll to the local treasury; but if he sells it himself the local treasury cannot make him pay to support the local government. This may, by jurisprudence, become the rule of law which we have to apply; but it appears to me it will not cease to be an arbitrary and illogical conclusion, and one which it is unfair to presume the Imperial Parliament contemplated.

I am most unwilling, in delivering a judgment on a question of law, to allude to the sensational importance attached to the decision, but these tax cases have been surrounded with such evidences of excitement that it may not be out of place to say a word on the [400] general reason for holding that the Imperial Parliament did not intend so to restrict local taxation. The cry of the persons carrying on the larger operations of trade is that, "If we may be taxed by the Local Legislatures, we are exposed to a double taxing power, and the ready access to our accumulated wealth, comparatively unrepresented, exposes us to be practised upon to save the pockets of our fellow subjects." The answer to this appears to me to be easy. The right to tax the greater operations of trade and commerce in consideration of the advantages derived from the local organization, appears to me a priori to be a fair and reasonable one. To say that it will be unfairly used is a fact which there is nothing to support specially. The tendency of the laws of all parliamentary governed countries is to extend the personal franchise at the risk of leaving property unprotected, and this is, at most, only an instance of what is going on everywhere. We cannot presume that Parliament did not intend to apply the principles here it is applying everywhere else. Lastly, there are two protections. First, the Federal Government can disallow an oppressive Act, and it would be its duty to do so if the interference with trade and commerce amounted to an inconvenience, Second, if prohibitory, it would come within the ken of the courts. I am to confirm.

DORION, C. J. :—

The appellants, John H. R. Molson & Bros., and Andrew Ryan, by their appeal, complain of a judgment rendered by the Superior Court, which has rejected their demand for a writ of prohibition to

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restrain Mr. Desnoyers, police magistrate of this district, from further proceeding on a complaint lodged before him against Ryan for having sold beer by wholesale, without having first obtained a license, as required by the Quebec License Act of 1878.

By their petition, the appellants alleged, in substance, that John H. R. Molson & Bros. had a license to manufacture beer on their premises at the city of Montreal, under the Inland Revenue Act of 1880, of the Dominion of Canada, that Ryan was employed by them to sell their [401] beer, that the Quebec License Act of 1878 was unconstitutional and that moreover it did not apply to John H. R. Molson & Bros., who, as manufacturers, had a right to sell the beer which they manufactured without a license, under the Quebec License Act, nor to Ryan who only sold for them as their employee and drayman.

The facts established by the evidence and admissions of the parties are that John H. R. Molson & Bros. have a license under the Revenue Act of 1880 (Dominion) to manufacture beer in the city of Montreal, that Ryan, who is in their employ, has sold beer for them by wholesale to their customers throughout the city of Montreal, that the orders for the beer he sold were filled at their establishment and that he received a commission on the price of the beer sold.

Three questions arise on this appeal :

1. Have the appellants upon their own showing, established such a want of jurisdiction in the police magistrate to entertain the complaint against Ryan as to justify the interference of the Superior Court by means of a writ of prohibition ?

2. Have the appellants, John H. R. Molson & Bros. the right to sell without a license, under the Quebec License Act, the beer which they manufacture ?

3. Has Ryan, as their employee, the right to sell beer for them on commission in any part of the city without such a license ?

Since the solemn decision of the Judicial Committee of the Privy Council on the case submitted under the provisions of the Dominion Act, 47 Vict., c. 32, (1) it cannot be disputed that the provincial legislatures have alone the right to grant licenses for the sale of liquor by wholesale, or by retail, nor can it be contended that the provisions of the Quebec License Act of 1878, as regards the granting of licenses for the sale of liquor, are unconstitutional, and the law having given to police magistrates the authority to hear and determine complaints arising out of any infringements of this license Act, Mr. Desnoyers was in the present case the proper

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(1) *Ante* p. 342.

[402] judicial officer to decide whether or not Molson & Bros. had a right to sell without a license, as required by the license Act, and also whether Ryan was acting as their employee or had a right to sell for them on commission, throughout the city, the beer which by virtue of their license they were authorized to manufacture.

It seems that if either John H. R. Molson & Bros. or Ryan have any license, or are authorized by any law to sell liquor without a special license under the Quebec License Act, it is for them to urge such exemptions before the tribunals authorized to take cognizance of breaches against the law, and any decision given on such contestation, although it might be contrary to law could not be said to have been given without jurisdiction.

The decision in the case of *The Charkieh*, (1) seems to apply to the present one. The *Charkieh* was attached under a warrant issued out of the Court of Admiralty for damages caused to the *Batavier* by a collision on the Thames. A rule nisi was granted for a writ of prohibition on the ground that the *Charkieh* was the property of the Khedive of Egypt. The Court declined to issue the prohibition, holding the question whether the *Charkieh* was the property of a foreign potentate, so as to exempt it from liability being one which might properly be decided by the Court of Admiralty. So in this case the question whether Ryan sold for John H. R. Molson & Bros. or on his own account on commission, or whether Molson & Bros. were by any law or authority exempt from taking a license under the Quebec License Act, were proper questions to be decided by the police magistrate, who is authorized to decide all complaints under the Quebec License Act.

The effort made to prevent the police magistrate from adjudicating upon this case seems to me as an attempt to remove the case from a tribunal, having by law jurisdiction over the complaint, to the Superior Court, which has no jurisdiction in the matter.

I do not wish, however, to rest my decision of the case on this [403] point, especially as I understand that my views are not shared by a majority of the members of this Court. Coming to the second point, I think that the several decisions rendered on these constitutional questions have considerably elucidated the subject, and that after the judgment in the case of *Hodge v. The Queen* (2) and the last decision of the Judicial Committee of the Privy Council, it may be considered as settled, that licenses issued to regulate the sale of liquor

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(1) L. R. 8 Q. B. 197.

(2) 9 App. Can. 117; ante vol. 3, p. 144.

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are not to be considered as being in restraint of trade and commerce, or for the regulation of trade and commerce within the meaning of the second sub-section of sect. 91 of the B.N.A. Act, 1867, but in the nature of police and municipal regulations, coming within the powers of the legislatures of the different provinces constituting the Dominion, and that there is no distinction to be made, as regards the authority of the provincial legislatures, between wholesale and retail dealers in liquor, nor between the sale made by a manufacturer from that made by an ordinary merchant. The law has made no distinction between those different classes of persons. They are all subject to the regulations made by the provincial legislatures as regards the sale of spirituous liquor. If we held that a manufacturer of beer or spirits can sell by wholesale, without a license as required by the Quebec License Act, we would have to hold that he can also sell by retail without a license, and, therefore, a manufacturer might establish on his premises as many bars or shops for retailing spirituous liquors as he might choose, without being subject to any of the regulations binding on other dealers in the same articles, and established for the protection and security of the public.

The case of *Severn v. The Queen* (1) has been cited as governing the present case. We might easily point out some material differences between that case and the present one, but it is not necessary to do so, as the majority of this Court hold that this case is not governed by the *Severn Case* (1), but by the decision in the *Hodge Case* (2), followed by last decision rendered by the Privy Council, holding that the right to [404] legislate on the issue of licenses for the sale of liquor, by wholesale or by retail, belonged to the local legislatures. It seems to me that to decide otherwise would be to overrule decisions of this Court in the cases of the *Corporation of Three Rivers v. Sulte* (3) confirmed by the Supreme Court (4); of *Bennett v. The Pharmaceutical Association of the Province of Quebec* (5), wherein we held that the provincial legislatures had the right to legislate as regards the sale of drugs, poisons and chemicals within the limits of the province, and lastly, the case of the *Hamilton Powder Co. v. Lambe*, (6) in which we have decided that the appellants, who were manufacturers of gunpowder, were bound to take a license, as required by the existing laws in the province of Quebec, to keep in their stores gunpowder in quantities exceeding twenty-five pounds, and also the

(1) 2 Can. S.C.R. 70; *ante* vol. 1, p. 414.

(2) 9 App. Cas. 117; *ante* vol. 3, p. 144.

(3) 5 Legal News, 330; *ante* vol. 2, p. 280.

(4) 11 Can. S.C.R. 25; *ante* p. 305.

(5) 1 Dorion 336; *ante* vol. 2, p. 250.

(6) M.L.R. 1 Q.B. 460.

decisions of the Privy Council already referred to, which have dealt with the power of the provincial legislatures to authorize the issue of licenses for the sale of spirituous liquors.

It is unnecessary to refer to the third question, inasmuch as a majority of the members of this Court are of opinion to affirm the judgment rendered by the Superior Court, and the demand of the appellants is therefore refused.

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[TESSIER, J., did not deliver any separate judgment].

The judgment of the Court is as follows :

“The Court, &c.

“Considering that the case is properly before the Court on a writ of prohibition, and further that the Statute of Quebec referred to is within the powers of the Legislature of the Province of Quebec ;

“Considering that there is no error in the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal, on the 14th of March, 1885, doth confirm the same with costs of both courts (MONK and CROSS JJ., dissenting).”



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 Oct. 13, 15;  
 Dec. 15.

THE LONGUEUIL NAVIGATION COMPANY,  
 (*Plaintiffs*), APPELLANTS ;

AND

THE CITY OF MONTREAL,  
 (*Defendants*), RESPONDENTS ;

AND THE

ATTORNEY-GENERAL FOR THE PROVINCE OF  
 QUEBEC,  
 (*Intervening Party.*)

*On Appeal from the Court of Queen's Bench for Lower Canada  
 (Appeal Side).*

[*Reported 15 Can. S. C. R. 566.*]

*Navigation and Shipping—Taxation of Ferries and Ferrymen—  
 39 Vict. c. 52 (Q.)—Costs.*

Notwithstanding the exclusive legislative authority over navigation and shipping possessed by the Dominion Parliament, a Provincial Legislature can confer on municipalities the right to tax ferrymen and ferries ; consequently the Quebec Act, 39 Vict. c. 52, by which the city of Montreal is authorized to impose an annual tax on ferrymen or steamboat ferries is valid.

The appellants, while successful on other grounds, having failed to seriously impugn the Act in question, were ordered to pay the costs of the Attorney-General.

[567] Appeal from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) confirming a judgment of the Superior Court.

The appellant company employed several of their boats to perform the ferry service between Montreal and Longueuil, and the Recorder's Court of the city of Mon-

\**Present*:—Sir W. J. RITCHIE, C.J., and STRONG, FOURNIER, TASCHEREAU and GWYNNE, JJ.

(1) M. L. R. 3 Q.B. 172 ; *post* p. 377.

treal having issued, at the instance of the city of Montreal, against the appellants a warrant of distress to levy the tax of \$200 which had been imposed on each of their boats, the respondents presented before one of the judges of the Superior Court a petition to suspend the proceedings on such warrant of distress and brought the present suit.

The action was in order to have the by-law of the city of Montreal imposing a tax of \$200 on each ferry boat employed by the appellant company between Montreal and Longueuil set aside and the Provincial Act, 39 Vict. c. 52, under the authority of which the by-law was passed, declared unconstitutional and ultra vires, because:

1. By the common law of the British Empire no citizen or British subject, nor any property of such citizen or subject, can be taxed twice for the same thing, the same object or the same purpose; the appellant company besides the special tax of \$200 pay a business tax of 7½ per cent. and stand ipso facto on an unequal footing with the other navigation companies.

2. Commerce and navigation are exclusively within the jurisdiction of the Parliament of Canada, and in the present case the Provincial Parliament acted ultra vires in granting to the city of Montreal power and authority to pass the by-law imposing a tax on the ferry boats of the said company.

[568] 3. The tax of \$200 is an indirect tax which impedes trade, and under the British North America Act the Provincial Legislature is not empowered to impose such tax.

4. The harbour of Montreal where appellants' boats are moored is situated beyond the limits of the city, and within the jurisdiction of the harbour commissioners, who alone are empowered to collect the wharfage dues on account of said mooring.

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5. The corporation has no power to impose a tax on any business, industry, labour, trade or occupation whatever carried on outside of its limits, nor can it be vested by any legislature with the power of imposing such a tax.

6. The preamble of by-law No. 94 only refers to the statute 37 Vict., c. 51, s. 78, which was repealed and wherein no mention is made of the Act 39 Vict. c. 52, which has been substituted for the latter, and it is fatal to the validity of the provisions therein contained.

The Attorney-General for the Province of Quebec intervened under 45 Vict. c. 4, to sustain the validity of the Provincial Act.

The city of Montreal pleaded to the action and affirmed the principle that the laws upon which the by-law was based were constitutional.

*Archambault*, Q.C., for appellant.

*Ethier* for respondents the city of Montreal.

*Roy* for the Attorney-General.

In addition to the points relied on by counsel in the courts below and which are sufficiently stated in the report of the case in M. L. R. 3 Q. B. 172, the learned counsel for the appellants contended that the by-law was beyond the Provincial Act.

RITCHIE, C. J :—

I think the Provincial Act is constitutional, but I think the by-law is bad because it does not follow the Provincial Act. The appeal should be allowed with costs.

[569] STRONG, J :—

The constitutional question raised by the action need not be considered save for the purposes of costs as hereafter mentioned, inasmuch as it is quite clear that the 23rd section of the by-law of the 21st April, 1876, was ultra vires of the city council. The only statutory

authority to which this provision of the by-law can be ascribed is the Provincial Statute of Quebec, 39 Vict. c. 52, s. 1, sub.-s. 3, which authorises the city to impose an annual tax on "ferry-men" and "steamboat ferries." These words could only authorise a single tax on the owner of each ferry irrespective of the number of boats or vessels by which the ferry should be worked. The plainest principles of construction require this even without the aid of this rule, which makes it imperative on us in case of doubt to adopt that interpretation which is most favourable to the party who is claiming exemption from a tax.

Then this 23rd section of the by-law in question provides that an annual tax of \$200 shall be imposed on ferry owners for every ferry boat which transports to the city passengers from any place no more than nine miles distant. This tax is manifestly in excess of the powers conferred by the legislature since it is not confined to the imposition of a single tax on each ferry owner but exacts the tax in respect of each steamboat used for the ferry, an imposition which can be referred to no statutory authority whatever. If we are to read sub-sect. 3 of sect. 1 of 39 Vict. c. 52 as in *pari materia* with the enactment on the same subject contained in the earlier Act of 37 Vict. c. 51, sect. 78 this becomes if possible still plainer for the last mentioned Act is also in words confined to authorising a tax on ferry-men irrespective of the number of vessels they may happen to make use of in operating their ferries.

[570] The portion of the by-law impeached is therefore *ultra vires* of the city and void, and the respondents should be prohibited from collecting the tax.

I have had some doubt whether the conclusions taken by the plaintiffs in the action were such as to entitle them to the judgment indicated, but having regard to the last clause of the conclusions it does not appear to

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me that such a judgment would be ultra the plaintiffs demand so as to offend against article 17 of the Code of Civil Procedure.

The appeal should be allowed with costs as against the city of Montreal and a judgment entered in the court below for the plaintiffs with costs. The appellants should, however, pay the costs of the Attorney-General, who has been put en cause for the purpose of sustaining the constitutional validity of the Statute, which was not seriously impugned, and indeed could not be in the face of the later decisions in the Privy Council, the tax authorised being clearly a direct tax such as a Provincial Legislature has authority to impose.

[*Translated.*]

FOURNIER, J:

[After discussing the question whether the by-law impeached was warranted by the statute, and concluding that it was not, the learned judge continued as follows, p. 573]:—

The appellants further maintain that the Act of the Quebec Legislature, on which this by-law is based, is tainted with unconstitutionality, as having been adopted in violation of the provisions of the B. N. A. Act, which grants to the Federal Government by sect. 91 sub-sect. 10, legislative powers over navigation and shipping. The provisions adopted by the Legislature of Quebec do not affect navigation, but only the regulation of ferries, which, before confederation, was under the control of the province of Canada, which had delegated to the corporations of Montreal and Quebec the power of taxing and regulating ferries. This power has not been withdrawn from the provinces, for it is clear that sub-sect. 13 of sect. 91, by assigning to the Federal Government only ferries between two provinces, or between a province and

foreign countries, has left to the provinces the power of [574] regulating ferries within their limits. This interpretation is strongly confirmed by sub-sect. 16 of sect. 92, which assigns to the provinces the legislative power in "generally all matters of a merely local or private nature in the province." A ferry like the one in question, is certainly a subject of a local or private nature, falling under the power of the provincial legislature. The powers conferred on this subject by different Acts of the Parliament of Canada before confederation, are still in full force. The consolidation made from time to time of the statutes concerning the corporations of the cities of Montreal and Quebec, has had no other effect than to continue these powers. I agree in the following observations of the Honourable Judge Baby on this question: "Before that period (confederation) it is certain that the corporation of Montreal had this power and exercised it. Now, by sect. 129 of the last recited Act (the B. N. A. Act), all laws in force in Canada at the union, have continued in existence as if confederation had not taken place, and that according to numerous decisions already given, even where these laws have been re-enacted or consolidated, as we have decided particularly in the cases of *Major v. La Corporation de la Cité de Trois Rivières*, and *Barras et la Corporation de Québec*." I agree equally in the observations of the learned judge designed to show that the jurisdiction of the Montreal harbour commission does not exclude that of the city on the subject of ferries. As they are somewhat lengthy, I will only cite those of Sir A. A. Dorion, C.J., on the same subject: "As to the jurisdiction of the harbour commissioners, that does not interfere with the control of the city. The harbour commissioners, by their charter, are excluded from levying a tax upon ferry boats plying within nine miles from the city. What was the object of that exception? It was because these boats were

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already subject to taxation by the city of Montreal

The corporation of the city have a right to tax the owners of properties extending to the river."

Finally, as to the illegality of article 23 of the by-law attacked, it is useless to consider the plea based on the [575] inequality in the imposition of this tax. On all these grounds, the appeal should be allowed with costs.

The Attorney-General of the province of Quebec, having been put en cause solely for the purpose of sustaining the constitutionality of the Act 39 Vict., c. 52, on which is based the by-law attacked, and being in no way interested in the other questions discussed, and this court being of opinion that the Act in question is *intra vires*, the appeal as to him should be dismissed with costs.

TASCHEREAU, J:—

The city of Montreal has power by 39 Vict., c. 52, to impose an annual tax on "ferry-men or steamboat ferries plying for hire for the conveyance of travellers to the city."

Under that Act the city has imposed an annual tax of \$200 on the proprietor of every and each ferry steamboat. It is evident that the statute does not support this tax. Each steamboat ferry, says the Act, not each ferry steamboat; one tax for each ferry, never mind how many steamboats are engaged, not a tax on each steamboat of a ferry.

The appellants, who are proprietors of a ferry on which they work many steamboats, every one of which is taxed at \$200 under the said by-law, ask that it be quashed. I think their contention well founded. The French version of the statute would rather support the by-law, but as the English version is clearly against it, we must on general principles determine adversely to the tax.

I think the appeal should be allowed with costs in all the courts against respondents, distracts, and by-law quashed.

On the issue with the Attorney-General, costs in all the courts against appellants.

[576] GWYNNE, J :—

I concur in allowing the appeal upon the ground of the tax imposed by the by-law not being authorised by the provincial Act.

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Judgments in Quebec Court of Q.B.—Appeal Side.

[Reported M. L. R. 3 Q. B. 172].

CROSS, J :—

The appellants brought the present action to set aside a by-law of the corporation of the city of Montreal, designated as No. 4 or No. 94 of their by-laws and made for the purpose of imposing an annual tax of \$200 upon all proprietors of steam ferry-boats plying for hire for the conveyance of travellers to the city of Montreal.

The declaration of the appellants comprises the following allegations: that, by sect. 78, of the Statute of Quebec, 37 Vict., c. 51, which constituted the city charter, it was enacted that the council of the city of Montreal could make by-laws for, among other purposes, to impose and levy an annual tax on ferrymen plying for hire for the conveyance of travellers by water to the said city, from any place not more than nine miles distant from the same; that [176] this provision was abolished and replaced by sub-sects. 2 and 3 of sect. 1 of the Statutes of Quebec, 39 Vict., c. 52, conferring somewhat similar powers. The council of the city of Montreal, claiming to act under said 37 Vict., passed a by-law on the 21st of April, 1876, by sect. 2, whereof they imposed an annual tax on steamboat companies, or their agents, doing business in the city of Montreal. That by sect. 23 of the said by-law, they imposed another annual tax to the amount of \$200 on the proprietor or proprietors of all steam ferry-boats plying for hire for the conveyance of travellers by water to the said city from any place not more than nine miles distant from the said city. It is mainly the second of these taxes that is contested, but the first is also objected to.

That said sub-sect. 13, of sect. 78 of said 37 Vict., c. 51, and sub-sect. 3 of sect. 1 of said 39 Vict., c. 52, both Statutes of Quebec, are unconstitutional, ultra vires, illegal, unjust and null; and said

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sect. 23, of said by-law No. 94 of the said city of Montreal, as well as all dispositions authorising the same, is and are ultra vires, unjust, illegal, null and void. That the tax was illegal, unequal and unjust and obliged appellants to pay a tax that other proprietors of steamboats were not obliged to pay. That it was an indirect tax and unconstitutional, more especially as it interfered with trade and navigation, which were exclusively under the control of the Federal authorities ; also, unconstitutional and ultra vires as purporting to authorise the city to impose and levy a tax beyond the city limits.

That the harbour commissioners were a corporation distinct from and independent of the city of Montreal, with powers and attributes and territorial limits of their own, derivable from and subject to the legislative control of the Federal authorities only. That the territory under their control was beyond and outside the limits of the city of Montreal, and it was to them, and to them only, that all harbour and wharfage dues were payable, and they only had the power to impose taxes or dues on vessels entering the harbour, or touching at those wharves.

[177] That the provisions in question of said by-law 94 were claimed to be passed under the authority of sect. 78 of 37 Vict., c. 51, which had been repealed before the passing of the by-law.

That sect. 126 of said 37 Vict., c. 51, still remaining in force, contained the proviso that all by-laws contrary to any law or statute in force in the province should be null and void.

That appellants were proprietors of steamboats affected by said sect. 23 of by-law 94.

The constitutionality of the Quebec Acts being thus questioned, the Attorney-General, as well as the city of Montreal, were made defendants in the cause.

Both defendants pleaded to the action and both maintained the constitutionality of the Statutes of Quebec. The city corporation further contended that the right of action, if any had existed, had been prescribed by the lapse of more than three months since the adoption of the by-law before action was brought, a limit imposed by sect. 12 of the Statute of Quebec, 42 & 43 Vict., c. 53. This last objection could have no force if the by-law was ultra vires. This was declared by the judgment of the Superior Court now appealed from, and I think is indisputable.

The facts appear to be established in accordance with the pleadings. This leaves the main question to be determined whether on the 21st of April, 1876, when the city council passed the by-law in question, they had power to do so, and the enquiry to be made from whence that power proceeded.

There were but two principal sources from whence that power could have been derived : 1. The local Legislature of the Province of Quebec, with limited authority. 2. The Legislature of the Province of Canada before confederation, having unlimited control over the subject.

It is contended that the authority conferred by sect. 78 of the Statute of Quebec, 37 Vict., c. 51, cannot be invoked, as that was repealed before the passing of the by-law in question, and stood [178] repealed at the time ; and although it was actually replaced by the first section of the Statute of Quebec, 39 Vict., c. 52, the city council did not base their authority on the latter law, but claimed only to act under the 37 Vict., c. 51. This, indeed, seems a formidable technical objection, difficult to be got over, but it would be much to be regretted if a case so important as the present should have to be controlled by this difficulty.

But suppose this difficulty overcome. Authority is claimed under the Quebec Act, 39 Vict., c. 52, passed 4th of December, 1875. It gives power to the city council corporation of Montreal to make by-laws ; among other things to impose an annual tax (to be called the business tax) on ferrymen or steamboat ferries plying for hire for the conveyance of travellers to the city from any place not more than nine miles distant from the same. It is doubtful whether this in terms would authorise the passing of the by-law in question by the city council, the statutory authority being to make by-laws to tax ferrymen or steamboat ferries, and the by-law being made to impose a tax on proprietors of steamboats. But suppose both to be sufficient in form ; it is obvious that two objections may be raised to the by-law : 1. that it authorizes the taxation of subjects outside the limits and jurisdiction of the city of Montreal ; and 2. that it may be an interference with navigation beyond the control of the local Legislature, that is, the taxation of steamboat ferries.

It may be replied that it is only a renewal of a power conceded to the city corporation by its early charter, contained in the Statutes

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of Canada, 14 & 15 Vict., c. 128, passed 30th of August, 1851, before confederation, and renewed by subsequent Statutes down to confederation ; that, although it authorised the taxation of subjects outside the city limits, and might have interfered with navigation, it was competent for the legislature, possessed at the time of unlimited power, to concede such authority.

Each and all of these propositions may be questioned for the following reasons : 1. Because the concession of power by the 14 [179] & 15 Vict., c. 128, and subsequent Acts of the Legislature of Canada, was more restricted in its terms than that of the 39 Vict., c. 52. 2. Because the rights of navigation and control over the river had been previously conceded to other bodies, and the concession to the city corporation was subject to the prior existing rights. 3. At the time of the concession of the right to the city of Montreal, the city was possessed of a river frontage where vessels arriving touched the city limits. It was to ferrymen plying to such limits, and to no other, that the city had power to issue licenses ; and by the competent authority of the Legislature, the shores of the river adjoining the city of Montreal were afterwards put under the control of and vested in the harbour commissioners, whereby they became an interposed jurisdiction between the city and the river, entirely cutting off the jurisdiction over ferrymen who could not thenceforward ply to or arrive at the city of Montreal.

In support of the first of these reasons, it may be remarked that the concessions of power regarding the tax in question contained in the Statute 14 & 15 Vict., c. 128, as well as in all the Statutes of the Province of Canada, are in similar terms, viz.: power to make by-laws to impose a duty upon and exclusive power to license persons acting as ferrymen to the said city or plying for hire for the conveyance of persons by water to the said city from any place not more than nine miles distant from the same, also that the first provision on the subject made by the Quebec Legislature after confederation contained in the 37 Vict., c. 51, is in like terms. The power thereby granted to impose the tax in question, was on ferrymen plying for hire for the conveyance of travellers by water to the said city from any place not more than nine miles distant from the same.

These laws were evidently at first made to suit the state of things existing at the time the power was conceded ; they were meant to

apply to ferrymen personally, who exercised a minor kind of traffic, and not to owners of vessels of a magnitude that might include them in the designation of being employed in navigation. Three [180] purposes were to be effected concerning them by the Statute 14 & 15 Vict., c. 128. They were to be licensed and regulated, and a duty might be imposed on them, besides which, the corporation were to assign them landing places. The corporation had also imposed on them the duty of making a tariff for them. The by-law made at the time for their regulation and the tariff will show what kind of ferrymen were in contemplation of the law.

It is entitled cap. 14, by-law relating to ferries, sect. 4: Every person obtaining a license shall keep in his service at least three able men, one canoe and one bateau, two setting poles, two oars and one paddle for each canoe and four oars and one large paddle for each bateau, etc. In all other respects the by-law and tariff were in accordance with the then existing statutes, and if a case could still be framed and tried on this by-law for the testing of the validity of the tax it would come up embarrassed with less complication than the present and might, perhaps, be received as the measure of the power possessed by the corporation over the subject, save in so far as interfered with by the statutes granting authority to other bodies. But the matter did not rest here; the Statute of Quebec, 39 Vict., c. 52, was passed 24th December, 1875, indicating to my mind a disposition to extend and usurp powers not previously possessed or claimed; its language is, on steamboat ferries plying for hire for the conveyance of travellers to the city from any place not more than nine miles distant from the same. It is to my mind doubtful if this language justifies the by-law now called in question. The authority is to tax steamboat ferries and the by-law imposes a tax on proprietors of steamboats; but if it does, it is only in that the terms of the Statute exceed the terms of the 14 & 15 Vict., c. 128, and the other Acts of the Parliament of Canada originally conferring the authority; the tax here indicated is not as originally on ferrymen plying for hire, but on steamboat ferries plying for hire, not that steamboats may not be used for ferries, but that such property being without the city of Montreal cannot be taxed by authority to tax ferrymen, and because steam-[181] boats were not contemplated in the original power to tax and pertain to navigation previously assigned to another jurisdiction and which could not be affected save by Dominion legislation.

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In support of the second reason the following may be urged : The first body created with jurisdiction over the river was the Trinity house, incorporated by the Statute 45 Geo. 3, c. 12, for Quebec, with extensive jurisdiction over the river from the Lachine rapids downwards, including the harbour of Quebec, its powers extending generally to the control of navigation on the river, especially in regard to the navigation of vessels. A separate Trinity house was afterwards created for Montreal by the Statute 2 Vict., c. 19, in 1839.

This corporation was ultimately dissolved and its powers transferred to the harbour commissioners by the Statute 35 Vict., c. 61.

The harbour commission was originally created by the Statute 10 & 11 Geo. 4, c. 28, to improve the harbour of Montreal according to the plan of Captain Piper. Its powers were extended by 1 William 4, c. 11, and by 2 William 4, c. 66 including the power of making a tariff and levying dues.

The limits of the harbour of Montreal under the control and management of the harbour commissioners, were defined by the Statute 8 Vict., c. 76, s. 5, from the lower extremity of the Lachine canal wharf downwards to the lower extremity of the revetment wall, at the point where it joined the government works at the commissioner's store, and on the side of the city, it adjoined the revetment wall.

The Statute 10 & 11 Vict., c. 56, passed in 1847, extended the limits downwards to the lower extremity of the Victoria road.

By the Statute 18 Vict., c. 143, s. 5, in 1855, the limit extended downward to the Ruisseau Migeon, and included the beach up to high water mark and the reserve for a road above high water mark. This completely excluded the city corporation from any river front-[182] age, and consequently rendered it impossible for them to fix or assign any landing places for ferrymen licensed by them to convey persons or travellers to the city, and equally rendered it impossible for such ferrymen to convey persons to the city, as the wharves of the harbour commissioners intervened.

This supports as well the second as the third reason above given.

The right of regulating navigation was first given to the Trinity house, afterwards transferred to the harbour commissioners. The right to regulate ferries given to the city was subject to this prior right and was intended to be of a very limited description, as above

explained, not at the time inconsistent with the jurisdiction of the harbour commissioners. To remove all doubt from this point, I quote from the Statute 24 Vict., c. 68, s. 6 (18th May, 1861), which declares that, notwithstanding anything contained in the Acts incorporating the city of Montreal or amending the same, no by-law of the corporation of the said city shall restrict or affect in any manner the exercise of the power conferred upon the harbour commissioners of Montreal under the various Acts relating to the said harbour.

It is thus shown that the harbour commissioners have an entirely separate and independent jurisdiction from that of the city of Montreal; they, in fact, levy tonnage and wharfage dues on all vessels entering the harbour. Their limits are guarded by a separate police. I am informed that the city police are not even allowed to make an arrest on the wharves. They are interposed between the city and the river. The city corporation cannot pass over them and levy on vessels outside of their limits; they cannot license ferrymen to ply to the city, because in so plying they do not come within the limits of the city nor within the city's jurisdiction.

Concurrent jurisdiction in such a case would be an inconsistency, and in a collision of jurisdiction the minor interest, that of a ferry, would have to concede to or be merged in the major interest of [188] navigation. The Quebec Parliament could not legislate to affect that interest. It would be inconsistent and unreasonable that steamboats crossing the river or going up or down only some miles should pay double dues, that is, both to the city and to the harbour commission, while those going ten miles or upwards would not be subject to double taxation. The claim to jurisdiction beyond the city limits is of an unusual and exceptional nature, and would require clear authority to support it, and must be subordinate and give way to an authority of a higher order.

The B. N. A. Act assigns navigation and shipping, as well as ferries between a Province and any British and foreign country, or between two Provinces, to the control of the Federal Legislature, but says nothing about inland ferries, leaving them to be regulated and licensed under par. 9 of sect. 92, but manifestly such power to license would have to give way to the major interest of navigation already established, or in case the Dominion Legislature at any time made a law in regard to navigation interfering with a ferry. Mr. Doutre, in his book on the constitution, at page 237, gives an

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instance wherein an Act of the Legislature of Nova Scotia incorporating a company with right to cross rivers was disallowed because it might interfere with navigation, although it made no reference to navigable rivers.

From these remarks, I think it must be apparent that the power conferred on the city corporation prior to confederation, when the Parliament of Canada had jurisdiction, is different from and less than the power attempted to be conferred by the Quebec Legislature after confederation, when that Legislature had no authority or pretext for interfering with navigation, and when the jurisdiction of the city corporation no longer extended to the river.

I think the judgment rendered by the Superior Court in this case, maintaining the constitutionality of the provisions of the Statutes impeached in this case, and the validity of the by-law of the Montreal city council passed by the authority of said Statutes, [184] in so far as it purports to impose a tax on proprietors of steamboats, is erroneous. I would reverse the judgment and annul the by-law complained of.

[*Translated.*]

BABY, J:—

Almost the only question presented here and which we have to determine is whether the city of Montreal had the right to pass and put in force the by-law of which the appellants complain. The court of first instance has decided in the affirmative, and it is from that decision that there is an appeal.

In order better to elucidate this question, let us see what is the law on which the respondents rely in order to maintain their claim.

The statute of the Legislature of Quebec, 37 Vict., c. 51 (1874), intituled: "An Act to revise and consolidate the Charter of the City of Montreal, and the different Acts amending the same," gives power to the council, by sect. 78, sub-sect. 13, to make regulations, to impose and levy an annual tax (called "business tax") among others, "on ferrymen plying for hire for the conveyance of travellers by water to the said city from any place not more than nine miles distant from the same."

Subsequently by the statute 39 Vict. c. 52 (1875), sect. 1, the said sect. 78 above in part recited was wholly repealed and replaced by another to the same effect, which gave power to the said council to pass and promulgate one or more by-laws for the following objects, among others: Sub-sect. 3: "To impose and levy an

annual tax on ferrymen or steamboat ferries plying for hire for the conveyance of travellers to the city from any place not more than nine miles distant from the same," etc.

The language of this sub-section we see differs somewhat from the preceding, especially in using after the word "ferrymen" the following, "or steam-boat ferries," which are not there used, that is to say, that the legislator has included not only the ferrymen using row boats, sail boats or horse boats, as was formerly done between Longueuil and the foot of the current, but also steam ferry boats.

[185] In accordance with this provision of the law on the twenty-first of April, 1876, the council of the city of Montreal passed a by-law known as and designated No. 94. and which contains the following: "Sect. 28. An annual tax of \$200 is hereby imposed and shall be levied on the proprietor or proprietors of each and every steam ferry boat carrying travellers to the city for hire from any place not more than nine miles distant from the said city."

It is this by-law against which the appellants now rebel, and they wish to arrest and suspend by writ of injunction the proceedings adopted by the respondents for the recovery of the tax in question—and pray that it may be declared not recoverable in law.

The principal reasons by which the appellants support their claims are :

1. The Legislature of Quebec has not power to regulate in any way, or to tax in any manner, navigation which is exclusively reserved by the B. N. A. Act to the Federal Government, and consequently could not delegate this power to the city of Montreal; in a word, that this Act was unconstitutional and ultra vires.

2. That the harbour commission of Montreal forms a corporation apart from the city of Montreal, and that it is proprietor of the wharves to which the appellants moor their boats, and that it is to that corporation that wharfage dues are owed for such moorage.

Let us see first whether the statute in question of the Legislature of Quebec is ultra vires.

Under the B. N. A. Act of 1867, the Parliament of Canada has exclusive jurisdiction over "navigation and shipping," but nothing prevents the provincial legislatures from being able to legislate on everything relating to municipal institutions (which belong to their special jurisdiction) which can have an indirect or remote connection with the subject, and it is that which the law of the country has sanctioned at many different times.

[186] Under the municipal common law, local or county councils, as the case may be, have the right of regulating ferries, of deter-

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mining the sum to be paid and the conditions to be observed for obtaining a ferry license and of fixing or approving the tolls payable for passing over ferries in a steam or other boat, arts. 549, 550, C. M. Cities and towns by their respective charters have the same rights. All ferries fall then under the absolute control of the municipal authorities in the province of Québec. A single exception is made to this right of municipalities to thus control all ferries, and is to be found in the B. N. A. Act, sect. 91, sub-sect. 18, which places "ferries between a province and any British or foreign country, or between two provinces," under the exclusive authority of the Parliament of Canada. Now here there is no question at all of that; the matter is plain; the only question is as to the imposition by the corporation of the city of Montreal of a tax on each ferry boat or steamboat which transports passengers to the city from a place within nine miles and vice versa. That is a by-law made for municipal and revenue ends alone, and does not interfere in any way with what is understood properly speaking by the word "shipping." The Legislature of Quebec had then the power of authorising the council of the city of Montreal to pass it, if it was found well to do so.

Besides, before confederation, the city of Montreal by its charter, 14 and 15 Vict., c. 128 (1861), sect. 58, had the power of "taxing, assessing and imposing charges on all persons acting as ferrymen to the said city, or transporting persons to the said city for hire by water from any place not being at a distance of more than nine miles from the city."

Relying on this law the council of the city more than twenty-five years ago made the following by-law with respect to taxes and assessments: Sect. 29. "An annual tax of \$200 shall be paid by [187] the proprietor or proprietors of each steamboat carrying to the city for gain persons from any part of the parishes of Laprairie, of Magdelaine, and of Longueuil, or from any wharf attached to the bank of the said parishes, etc." The language in this document does not differ in anything, it will be observed, from that which is now before us.

It is then evident that this right of imposing a tax on steam ferry boats is not a novelty, a gradual encroachment on the federal power as has been alleged, but existed long before the B.N.A. Act came in force.

Before that period it is certain that the corporation of the city of Montreal had this power and exercised it. Now by sect. 129 of the last recited Act, all laws in force in Canada at the union

have continued in existence as if the union had not been made, and that according to the numerous decisions already given, even where the laws have been re-enacted or consolidated, as we have decided particularly in the cases of *Major and the Corporation of the City of Three Rivers* and *Barras and the Corporation of the City of Quebec*. Supposing then that there could have been a doubt as to the power of the Legislature of Quebec to confer on the corporation of the city of Montreal the right of passing such a regulation since confederation—which I do not admit—this doubt would here entirely disappear, and we are therefore of opinion that the law of 1874, authorising the council of the city of Montreal to impose the tax in question by the by-law under discussion, is not ultra vires. But it is said this last Act does not use the word steamboat, and it has been added in the consolidation, which cannot confer on the corporation of the city of Montreal a power which it did not before have. Admitted, but the word “ferryman,” which occurs in the said Act of 1874, as well as in all the others on the subject, extends as well to the person who transports across the water as to the vessel which he uses for the purpose, whether the latter be moved by steam, by wind, by oars, or by other means. This is the [188] fixed meaning which has been given to this provision, as we have shown by the quotations above made from the by-laws passed on the subject. A corporation we know is not authorised to levy taxes except so far as this power is expressly conferred on it by its charter, but at the same time it is necessary to place an interpretation on the terms conferring this same power, which is not so rigorous that it can destroy and nullify the intention of the legislator.

[The learned judge then considered the other objections raised by the appellants and continued, p. 189]:

On the whole, the majority of this court is of opinion that the council of the city of Montreal had the power of passing the by-law in question and of imposing the tax therein contained, and that the judgment of the Superior Court supporting it is correct, and it is therefore affirmed with costs against the appellant.

DORION, C. J:—

If it were not for the importance of this case, I should not be disposed to add a word to what has been said. But in view of the constitutional question which has been raised, I may state [190] briefly the reasons why it seems to me that the judgment should be confirmed. In the first place, ferries between two points within a province are under the jurisdiction of the local Legislature. This

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is quite clear from the terms of article 13 of sect. 91, B. N. A. Act, by which ferries between a province and a foreign country, or between two provinces are placed under the jurisdiction of the Dominion Legislature. It follows that ferries between points within a province come under the powers conferred upon the local Legislatures. But that is not all. By paragraph 16 of sect. 92 "generally all matters of a merely local or private nature in the province" are assigned to the local Legislatures. A ferry between two points in a province is surely a matter of a local or private nature. It also appears, on reference to the statutes, that the city possessed the power to tax ferries prior to confederation, and that law has never been repealed. There can be no doubt, therefore, that the provincial Legislatures have the right to regulate ferries, within the Province.

As to the by-law being passed under the 37 Vict., although the original Acts are replaced by the new Act, the provisions of the old Acts are not considered as repealed. The consolidation is a continuation of them.

As to the jurisdiction of the harbour commissioners, that does not interfere with the control of the city. The harbour commissioners by their charter are excluded from levying a tax upon ferry boats plying within nine miles from the city. What was the object of that exception. It was because these boats were already subject to taxation by the city of Montreal. The harbour commissioners have power to tax proprietors of vessels who bring such vessels to the harbour of Montreal. The corporation of the city have a right to tax the owners of properties extending to the river.

Further, it has been decided by the majority of this Court that the Legislature of the Province has the right to tax the proprietors of foreign vessels doing business within the province. (1) If so, it certainly has a right to tax ferry companies running boats between points within the province.

I am, therefore, of opinion that the judgment should be confirmed, first, because this was an Act relating to a matter of a local and municipal nature; it was the exercise of a power existing before confederation and never repealed; and, moreover, the right of the local Legislatures to tax ferries within the province is clear from the terms of the B. N. A. Act itself.

[TESSIER, J., did not deliver any separate judgment.]

(1) See *North British and Mercantile Fire and Life Insurance Co., v. Lambe*, M. L. R. 1 Q. B. 122, and

S. C. sub. nom. *Bank of Toronto v. Lambe*, 12 App. Cas. 575, ante. p. 7

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[*Reported M. L. R., 2 S. C. 18.*][*Translated*].

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LORANGER J :—

On the eighteenth of April, 1883, the plaintiff began an action against the defendant and made the Attorney-General of the Province of Quebec a party. The plaintiff alleged that the defendant, a municipal corporation, had been authorised by an Act of the provincial Legislature, 39 Vict., c. 52, to impose an annual tax on the vessels or steamboats which carry for hire passengers in the city of Montreal from any place situated at a distance of more than nine miles from the city; that the defendant had imposed an annual tax of \$200 on the plaintiff and had attempted to collect the amount by means of a warrant of distress issued from the Court of the Recorder of the said city; that the said Act, 39 Vict., c. 52, and the said by-law are ultra vires, unjust and unconstitutional:

1. Because they impose a tax which is not uniform on things of the same nature.
2. Because the Federal Parliament alone has the right of making regulations as to what affects commerce and navigation.
3. Because the tax in question is an indirect tax, while the provincial Legislature can only impose a direct tax.
4. Because the defendant cannot impose any tax outside of its limits, and the harbour not being within the limits of the city of Montreal it cannot tax vessels which are found there.

It was prayed that the said Act and the said by-law might be declared ultra vires and unconstitutional and that the defendant should be forbidden to collect the said tax.

The defendant pleaded (1) that the Act and the by-law attacked were constitutional and that they had the right to impose the tax as they had done; (2) that three months having expired since the by-law was put in force the right to attack it was gone.

The Attorney-General of the province of Quebec, having appeared, answered the action in like manner by maintaining the constitutionality of the Act of the provincial legislature.

It was admitted that the wharves to which the vessels of the plaintiff came were the property of the corporation of the harbour commissioners.

The action was dismissed by the following judgment :

The Court, etc.

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—

Statement of facts :

[20] Whereas the defendant is authorised by the first section of chapter 52 of the 39 Victoria, to levy an annual tax on ferries or steam ferryboats which carry in the city for hire travellers from any place not being at a distance of nine miles ;

Whereas the plaintiff, a navigation company, possessed at the periods mentioned in the declaration ferryboats carrying for hire travellers from Longueuil to the wharf of the harbour of Montreal within the distance above mentioned ;

Whereas the Act above cited is within the powers conferred on the provincial legislature in virtue of section 92 of the British North America Act ; that consequently the defendant in enacting the above by-law has acted within the limits of an authority lawfully constituted ;

Whereas although the harbour is not included within the limits of the city, yet the defendant possesses in virtue of the Act above cited a right of taxation over the ferryboats of the plaintiff ; and whereas that Act being constitutional and the deed of a competent power the defendant is allowed to take advantage of it ;

Whereas in virtue of section 12 of chapter 53 of the 42 and 43 Victoria the quashing of any by-law made by the defendants must be asked for within three months from the time such by-law comes in force, and the only exception that can be made is when such a by-law is unconstitutional or ultra vires, which is not the case in the present instance ;

Whereas there is no proof that the said by-law is exaggerated and unjust ;

Whereas the plaintiff has not established its claim ;

Sustains the defence of the defendants and dismisses the action with costs.

HER MAJESTY THE QUEEN,

APPELLANT;

AND

THE BANK OF NOVA SCOTIA, ET AL.,

(Liquidators) RESPONDENTS.*On Appeal from the Supreme Court of Prince Edward Island.**[Reported 11 Can. S. C. R. 1.]**Prerogative of Crown—Insolvent bank.*

The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government.

The prerogative privilege to priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a Provincial corporation in a Provincial court (1).

Appeal from an order or decision of the Supreme Court of Prince Edward Island, made and given on the third day of November, A. D. 1884. The following is the special case:—

“The President, Directors and Company of the Bank of Prince Edward Island” were a banking corporation, incorporated by the Legislature of Prince Edward Island by an Act, passed in the year one thousand eight hundred and forty-four, intituled: “An Act to incorporate

**Present*:—Sir W. J. RITCHIE, C. J., and STRONG, FOURNIER, HENRY and TASCHEREAU, JJ.

(1) [See next case]

1885*
 Feb. 23;
 June 26.

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sundry persons by the name of 'The President, Directors and Company of the Bank of Prince Edward Island.' "

The said company, from the time of its incorporation [3] until its insolvency, hereinafter mentioned, transacted a banking business in Prince Edward Island.

On the first day of July, A.D. 1873, Prince Edward Island became part of the Dominion of Canada.

The Bank of Prince Edward Island never came under the provisions of any of the banking Acts of the Parliament of Canada, but the Parliament acknowledged its existence by the passage of an Act, in the forty-fifth year of the present reign, cap. 56, intituled: "An Act for the Relief of the Bank of Prince Edward Island."

The said Bank of Prince Edward Island became insolvent and on the nineteenth day of June, A.D. 1882, an order was made by the Hon. James Horsfield Peters, one of the judges of the Supreme Court of Prince Edward Island, for the winding-up of the said bank, under the provisions of the Act, 45 Vict., c. 23, intituled: "An Act respecting insolvent banks, insurance companies, loan companies, building societies and trading corporations."

The Bank of Prince Edward Island, at the time of its insolvency, was indebted to Her Majesty in the sum of \$93,494.20, being part of the public moneys of Canada, which had been deposited by several departments of the Government, to the credit of the Receiver-General.

The respondents do not deny that the bank, at the time of its insolvency, owed Her Majesty \$93,496.20 of the public moneys of Canada, deposited to the credit of the Receiver-General, and the only question arising for decision now is: Is Her Majesty entitled to be paid in

full? In other words, is Her Majesty a privileged creditor, or must she rank as an ordinary creditor and take a pro rata amount?

It is agreed between Her Majesty and the respondents that the question to be raised and decided on the present appeal shall be:—

Is Her Majesty, in her Government of Canada, entitled [4] to be paid the full amount of the said indebtedness of the insolvent company to her, in priority to the simple contract creditors of the said insolvent company?

If the Supreme Court of Canada decide that Her Majesty is so entitled, then the appeal is to be allowed, and the respondents ordered to pay the said indebtedness in full.

The Bank of Prince Edward Island became insolvent, and the winding-up order was made on the 19th June, 1882.

The first claim filed by the Minister of Finance, at the request of the respondents, did not specially notify the liquidators that Her Majesty would insist upon her privilege of being paid in full.

Two dividends of 15 per cent. each were afterwards paid, and on the 28th of February, 1884, there was a balance due of \$65,426.95, over and above the \$30,000.

On that day (28th February, 1884), Mr. Hodgson acting for the Crown, notified the respondents that Her Majesty intended to insist upon her prerogative right to be paid in full.

At the time of serving this notice the liquidators had in their hands a sum sufficient to pay Her Majesty's claim in full.

A more formal demand for preference was made on the 17th March, 1884.

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The objections to Her Majesty's claim (filed by leave of Mr. Justice Peters) were heard before him. The first objection is :—

"That Her Majesty the Queen, represented as aforesaid" (by the Minister of Finance and the Receiver-General) "has no prerogative or other right to receive from the liquidators of the above-named banking company the whole amount due to Her Majesty, as claimed by the proof thereof, dated the 8th day of March, A.D. 1884, and has only a right to receive dividends as an ordinary [5] creditor of the above-named banking company."

This objection was allowed.

From the order allowing this objection, an appeal was taken (under sect. 78 of 45 Vict., c. 23) to the Supreme Court of Prince Edward Island.

That court, by order dated 4th November, 1884, affirmed Mr. Justice Peters' order, and dismissed the appeal.

Permission to appeal to the Supreme Court of Canada from this order was granted by Mr. Justice Strong on the 26th day of November, 1884.

G. W. Burbidge, Q.C., and *E. J. Hodgson*, Q.C., for appellant :

The Queen, as the head of the Government of Canada is invested with all her prerogatives, and will not be held to be deprived of any of them by parliament, unless the intention to do so is expressed in explicit terms, or the inference is inevitable (1); *Lenoir v. Ritchie* (2); *Cushing v. Dupuy* (3); *Johnston v. Minister and Trustees of St Andrew's Church* (4); *Theberge v. Landry* (5); *Marquis of Hartington v. Bowerman* (6).

(1) 31 Vict. c. 1, s. 7 (33); [R. S. C. c. 1, s. 7 (46)]

(2) 3 Can. S.O.R. 575; ante vol. 1, p. 488.

(3) 5 App. Cas. 409; ante vol. 1, p. 252.

(4) 3 App. Cas. 159.

(5) 2 App. Cas. 102; ante vol. 2, p. 1.

(6) Ir. Rep. 2 C. L. 683.

The court below conceived itself bound by the winding-up Act, 45 Vict., c. 23, to order the distribution of the assets equally, even as against the Queen:

Now we admit that the Crown is bound by a statute "made for the public good, the advancement of religion and justice, and to prevent injury and wrong," without [6] being expressly named: *Bac. Abr.* (1); *The King v. Wright* (2). But the statute under which this insolvent bank is being wound up (45 Vict. c. 23) is not a statute within these exceptions.

In re Henley & Co. (3) is decisive upon the question at issue in this case (4).

The court below decided that the prerogative right to be paid in full is in the Government of Prince Edward Island, to the exclusion of the Queen in her Government of Canada, and that had this been an indebtedness to the former Government, and proper proceedings taken to make it a record debt, it would have been entitled to preference over all other creditors.

The learned Judge, in the court below, has misapprehended the preamble to the British North America Act, when he says: "It is true that the Provinces have given executive power to the Dominion over subjects before belonging to them, but by the convention recited in this preamble they are to have a constitution similar to that of England regarding her colonies, with respect to the subjects retained, and, if so, the Lieutenant-Governors must have the Queen's prerogative still vested in them."

[7] It is not the Provinces, but the Dominion of

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(1) *Prerogative* (E) 5.
(2) 1 A. & E. 434.

(3) 9 Ch. D. 469.
(4) See also *In re Oriental Bank Corporation*, 28 Ch. D. 643.

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Canada, which the preamble declares, is to have a constitution "similar in principle to that of the United Kingdom;" *City of Fredericton v. The Queen*. (1).

The whole judgment of the court below is based on this fallacy.

The fact of the insolvent bank being a local institution does not affect the question to be decided. If moneys due to the Crown were in the possession of a commercial firm or private individuals, residing and doing business in Prince Edward Island, and they became insolvent, the Queen would not be deprived of her prerogative right to be paid in preference to other creditors, on the ground that the commercial firm or the private individual had never been brought under the control or influence of the Dominion Government.

R. Fitzgerald, Q. C., and A. Peters, for respondent.

The Crown's claim to a preference arises under what are termed the minor prerogatives of the Crown, which do not extend to this Province. See *Attorney-General v. Judah* (2).

The right of the Crown in relation to all such minor prerogatives can only be exercised in Prince Edward Island by the Queen in her Government thereof, and for the benefit of the Province. This would clearly have been the case before confederation, and there is nothing in the British North America Act conferring on the government of Canada the right to exercise these prerogatives.

The autonomy of the provinces is preserved by the British North America Act, and their several Lieutenant-Governors represent the Queen in the performance of

(1) 3 Can. S. C. R. pp. 503, 580; ante vol. 2, pp. 27, 53.

(2) 7 Legal News, 147.

many executive, prerogative and administrative acts. It is contended that the prerogative here claimed (if it [8] exists) is vested in the Lieutenant-Governor, and cannot be exercised both by the Provincial and the Dominion Governments. If such a right existed in both Governments their several interests might clash, and in case of deficiency of assets, must clash. Supposing such a contest, can it be contended that the provincial prerogative, which existed previous to confederation, has been taken away without express enactment: *Attorney-General v. Mercer* (1); *Holmes v. Reg.* (2).

At confederation only such of the prerogatives as were necessary for carrying on the general government of Canada, became vested in the Governor-General, and the prerogative right to a preference here claimed is not necessary for such purpose.

The Crown's claim in this case clearly arises out of a simple trading contract, the Crown dealing with the bank as an ordinary customer, and in such case, we contend the Crown has no privilege over any other creditor. *Attorney-General v. Black* (3); *Monk v. Ouimet* (4).

Hodgson, Q. C., replied.

RITCHIE, C. J :—

The debts due by the insolvent bank to "the various persons and corporations" are due by simple contract only.

The ground upon which Mr Justice Peters has rested his judgment is stated by him as follows :

"I have now gone through the various points raised by the issues, and I wish to observe, that although some of my observations may apply to provincial banks and

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(1) 5 Can. S. C. R. 538 ; ante vol. 3, p. 16.
(2) 8 Jur. N. S. 76.

(3) Stewart's Rep., 325.
(4) 19 L. C. Jurist. 71.

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corporations generally, the ground on which I rest my decision is, that the insolvent bank is a purely local institution, never brought under the control or influence of the Dominion Government, in any way, and whose claim is, therefore, a civil right of a merely local and private nature, in this province. Whether a provincial bank, holding its charter from the Dominion Government, or brought under the Dominion Bank Act, would occupy the same position is a question not before me, and on which I, therefore, express no opinion.

“The claim of the Crown must be dismissed with costs, and I order that the costs, when taxed, be deducted from the dividend now ready to be paid to the Receiver General of the Dominion.”

This, it appears to me, is conclusively answered in the factum of the appellant, where it is said :

“The appellant contends that the fact of the insolvent [10] bank being a local institution does not affect the question to be decided. If moneys due to the Crown were in the possession of a commercial firm or private individuals, residing and doing business in Prince Edward Island, and they became insolvent, the Queen would not be deprived of her prerogative right to be paid in preference to other creditors, on the ground that the commercial firm or the private individuals had never been brought under the control or influence of the Dominion Government.”

I do not think there can be a doubt that the Crown is entitled, at common law, to a preference in a case such as this, for when the rights of the Crown come in conflict with the right of a subject in respect to the payment of debts of equal degree, the right of the Crown must prevail, and the Queen's prerogative in this respect, in this

Dominion of Canada, is as exclusive as it is in England, the Queen's rights and prerogatives extending to the colonies in like manner as they do to the mother country.

[The learned Judge then discussed the question of laches and the authorities as to the prerogative of the Crown, and continued, p. 14 :—]

The learned judge, in the court below, referred to what I said in *Attorney-General v. Mercer*(1), as to the Lieutenant-Governors of provinces representing, in a limited manner, the Crown. To all that I said in the case referred to by the learned judge I still adhere, but what I then said has no bearing on the present case, but must be read with reference to the cases I was then considering. In regard to the case before us, I may say I can discover nothing in the British North America Act which takes away from Her Majesty the prerogative right in regard to debts due Her Majesty in the Dominion of Canada, of an Imperial character, or in relation to the Government of Canada.

No question arises in this case as to the rights of the local Government, should it be a creditor, or of the relative rights of the Dominion and Provincial Governments, should both be creditors, with assets only sufficient to pay one, as has been suggested. It will be quite time enough to deal with these questions when they arise.

STRONG, J :—

Four questions are raised by this appeal. First, the right of the Crown, claiming as a simple contract creditor, to priority over other creditors of equal degree, as a general rule, of English law, is disputed. Secondly, assuming the Crown to have this right, according to the general rule, it is denied that such a prerogative privilege

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appertains to the Crown, as representing the Dominion of Canada, when claiming as a creditor of a provincial [15] corporation in a provincial court. Thirdly, it is insisted that the priority of the Crown, even if it exists and applies in favour of the Crown in its Government of Canada, as regards ordinary proceedings for the recovery of debts at common law, is taken away by the Act of Parliament, 45 Vict. c. 23, under which the present proceedings in insolvency are being taken. And lastly, it is urged, that failing all of the preceding contentions, the Crown has, in the present instance, by the form in which its claim was made and by the acceptance of the two dividends already declared, waived its right to be preferred to other simple contract creditors.

In my opinion, the Crown is entitled to succeed on every one of these points, and that upon authority so clear and decisive as to leave little room even for argument on the part of the liquidators.

The rule of law formulated in the maxim, *quando jus domini regis et subditi concurrunt, jus regis præferri debet* we find propounded by Lord Coke, in 9 Rep. 129, and also in Co. Litt. 30b, and recognized in many later authorities (1); and its existence at the present day, as a well established principle of the constitutional law of the Empire relating to the royal prerogative, was distinctly recognized and acted on by the English Court of Appeal in the late case of *In re Henley & Co.* (2) decided as recently as 1879. This case of *In re Henley & Co.*, (2) has been said, not to be a decision upon the point in question, but a mere dictum. This is not so, for the report of the case itself, as well as later judicial recognition and comments, show that the right of the Crown, as a simple contract

(1) *Giles v. Grover*, 9 Bing. 128; *Rez v. Edwards*, 9 Ex. 32, 628; 5 Bacon's Ab. 558.

(2) 9 Ch. D. 469.

creditor, to priority over other simple contract creditors, was one of the rationes decidendi upon which all of the [16] three eminent judges who decided it proceeded. That case arose under a "winding-up" proceeding under the Companies' Act, 1862. The claim of the Crown was for arrears of income tax, in respect of which it had a right of distress. Vice-Chancellor Malins, in a long judgment, which need not be particularly referred to, held that the Crown was only entitled to payment out of the assets of the company, ratably with other creditors of like degree. The Crown appealed, and, although the arguments of counsel are not given in extenso in the report, it is apparent, from the authorities cited, that the right of the Crown was rested, not merely on the statutory right of distress, but also on the general preference which is now in question ; and that the judgment of the court proceeded as much on one of these grounds as on the other, is apparent from the language of the learned judges.

James, L.J. says:—"But if the matter is treated as a matter solely of administration of assets under the direction of the court, I think it is also right. Whenever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition, the Crown's right prevails. Whether, therefore, the debt is treated as a debt of record, or of specialty, or of simple contract, there being a right of priority in the Crown, it is right that the debt should be paid."

Brett, L.J. says:—"But suppose we regard it merely as a simple contract debt ; then in the administration of the assets of the company the Crown comes into competition with the other simple contract creditors, and then the other prerogative to which I have alluded comes in, namely, that in competition with subjects the right of the

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Crown must prevail. Therefore, in whichever way we look at the question, I think the Crown ought to be paid this debt in priority."

Cotton, L. J. concludes his judgment as follows:—" But if the case is looked at as one in which the Crown submits to come in under the administration of assets in the winding-up, there is still the right which the Crown has, when in competition with other creditors, of being paid in priority."

[17] These extracts show conclusively, that the principle now disputed was one on which the judgment *In re Henley & Co.* (1) was based by all the judges who took part in the ultimate decision of that case. Further, if anything additional is wanting to show that what the judges who decided *In re Henley & Co.* (1) say in the quotations before given were no mere dicta, the case of *In re Oriental Bank Corporation* (2) may be cited. Chitty J., who decided the last-mentioned case, referring to *In re Henley & Co.* (1) says:—" In that case there were two prerogatives brought into question the one was the prerogative of the Crown, when assets had to be administered, to priority over the subject. It was held that that priority was not taken away."

And again:—" Now the fund to be administered would consist, by virtue of the decision in *In re Henley & Co.* (1) of the whole of the assets of the company, if the Crown came in under the liquidation, and sought to prove, and the Crown would then retain its right of priority as against the other creditors."

These observations of Mr. Justice Chitty show that he recognized the authority of *In re Henley & Co.* (1) as determining the point which now calls for decision; but,

(1) 9 Ch. D. 469.

(2) 28 Ch. D. 643, 648.

further than this, it appears that, without question by the counsel for the liquidator, Mr. Justice Chitty acted on this view of the effect of *In re Henley & Co.* (1) and in this same case of *In re Oriental Bank Corporation* (2) gave the Crown priority in respect of simple contract debts over other simple contract creditors.

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It being thus demonstrated by satisfactory authorities that the Crown has the right of precedence now claimed, according to the fundamental doctrines of English constitutional law, is any distinction to be made in applying such a rule in England and in the Province of Prince Edward Island? That the law of England is the rule [18] of decision in the province has not been and cannot be disputed, nor has it been pretended (save as regards the very statute now in question, a matter to be separately considered hereafter) that by any express and direct legislation, provincial, federal or imperial, the rights of the Crown as applicable in Prince Edward Island, have been in any way interfered with. Authorities which it would be useless to quote, so familiar are they, establish that in a British colony governed by English law the Crown possesses the same prerogative rights as it has in England, in so far as they are not abridged or impaired by local legislation, and that, even in colonies not governed by English law, and which, having been acquired to the Crown of Great Britain by cession or conquest, have been allowed to remain under the government of their original foreign laws, all prerogative rights of the Crown are in force, except such minor prerogatives as may conflict with the local law. The two decisions of the Court of Queen's Bench of the Province of Quebec, *Monk v. Ouimet* (3)

(1) 9 Ch. D. 469. (2) 28 Ch. D. 643.
(3) 19 L. C. Jurist, 71.

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and *Attorney-General v. Judah* (1) may, perhaps, be referred to this distinction. Then, if the Crown's right of priority has been taken away in Prince Edward Island, it can apart from the provisions of the Insolvent Act, only be by some of the provisions of the British North America Act. The most careful scrutiny of that statute will not, however, lead to the discovery of a single word expressly interfering with those rights, and it is a well settled axiom of statutory interpretation, that the rights of the Crown cannot be altered to its prejudice by implication, a point which will have to be considered a little more fully hereafter but which it may be said at present affords a conclusive answer to any argument founded on the British North America Act. Putting aside this rule [19] altogether, I deny, however, that there is anything in the Imperial legislation of 1867 warranting the least inference or argument that any rights which the Crown possessed at the date of confederation, in any province becoming a member of the Dominion, were intended to be in the slightest degree affected by the statute. It is true, that the prerogative rights of the Crown were by the statute apportioned between the provinces and the Dominion, but this apportionment in no sense implies the extinguishment of any of them and they therefore continue to subsist in their integrity, however their locality might be altered by the division of powers contained in the new constitutional law. It follows, therefore, that the Crown, speaking generally, still retains this right to payment in priority to other creditors of equal degree in Prince Edward Island.

It is said, however, that, whilst the last proposition may be true as regards the rights of the Crown as repre-

(1) 7 Legal News, 147.

senting the provincial government of the island, it does not apply to the Crown as representing, as in the present case it does, the government of the Dominion. This objection is concluded by authority still more decisive than the former. That the Crown is at the head of the government of the Dominion, by which I mean that Her Majesty the Queen is, in her own royal person, the head of that government, and not her viceroy, the Governor-General, there can be no doubt or question, for it is in so many words declared by sect. 9 of the British North America Act, which enacts—"The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

That, for the purpose of entitling itself to the benefit of its prerogative rights, the Crown is to be considered as one and indivisible throughout the Empire, and is not [20] to be considered as a quasi-corporate head of several distinct bodies politic (thus distinguishing the rights and privileges of the Crown as the head of the government of the United Kingdom from those of the Crown as head of the government of the Dominion, and again, distinguishing it in its relations to the Dominion and to the several provinces of the Dominion) is a point so settled by authority as to be beyond controversy. In the case already referred to of *In re Oriental Bank Incorporation* (1) this very point occurred, and the counsel who opposed the contention of the Crown, with the approval of the learned judge, declined to argue it. The claim of the Crown there was to priority over simple contract creditors, in respect of a simple contract debt (amongst others) due to it in right of its government of the colony of Victoria—a colony

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possessing a constitutional government; and the counsel for the liquidator, so far from drawing any distinction between the claims of the Crown in respect of its Imperial rights, or as representing colonies, and as representing Victoria, say: "We are quite willing to concede that the prerogative of the Crown in the colonies is as high as in this country;" and the learned judge (Mr. Justice Chitty) says, at the end of his judgment: "No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of Imperial rights, and the rights of the Crown with regard to the colonies."

In *In re Bateman's Trust* (1) the Crown claimed in England the goods and personal property of a felon, as for a forfeiture on a conviction for felony in the colony of New South Wales and it was there seriously argued that the rights accruing to the Crown under such forfeiture were not enforceable in England. The court (Bacon, V. C.,) however, entirely rejected this contention, and determined that the rights of the Crown were not to [21] be considered divisible according to the several governments and jurisdictions into which the Empire is apportioned, but that prerogative rights, accruing to it in one jurisdiction, may be enforced against persons and property, anywhere throughout the Queen's dominions. To these authorities may also be added the well known cases which have determined that the benefit of the prerogative applies when the Crown sues nominally though entirely in the interests of private parties, upon recognizances given by, or as security for receivers and committees of lunatics, in which cases it has long been the universal practice to treat such debts as debts of record due to the Crown, entitling the parties interested to the benefit

(1) L. R. 15 Eq. 355.

of the Crown's title to priority in respect to that class of obligations. It is therefore safe to conclude, as a general proposition of law, that whenever a demand may properly be sued for in the name of the Queen, the prerogative rights of the Crown attach in all portions of the British Empire subject to the prevalence of English law, irrespective of the locality in which the debt arose and of the government in right of which it accrued.

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[The learned Judge then discussed the effect of the winding-up Act and added, p. 23:—]

My conclusion is, that the order of the court below must be reversed, and an order allowing the claim of the Crown to be paid in full substituted for it, with costs both in this court and the court below.

FOURNIER, J:—

For the reasons given by the Chief Justice, I am of opinion that the appeal should be allowed.

HENRY, J:—

I never had any difficulty in this case. There is no authority that I can find, in opposition to the principle that where the claim of the Crown under a simple contract and the claim of a subject under a simple contract conflict, the Crown has precedence. So, whatever may be the degree of the claim, when the Crown is otherwise on an equal footing with the subject, the decisions have always been that the Crown is entitled to precedence. The Crown represented in the Dominion and the Crown represented in Prince Edward Island; in fact, in each of the Provinces, might possibly have claims against the same debt. What proportion should be allotted to each in such a case would be a matter for subsequent regulation and settlement; but the fact that the Crown has a claim for the Dominion, and a claim for each of the Provinces, certainly cannot affect the decision in this case.

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—

I think the grounds taken by the learned judge below were untenable, I do not think there is any waiver in this case. The evidence does not point to any such waiver. Certainly, the parties who received dividends did not expressly stipulate that there should be a waiver of any of the rights of the Crown; and even if they had [24] done so, I do not think they had the power to bind the Crown. I think the appeal should be allowed.

TASCHEREAU, J:—

I am also of opinion that this appeal should be allowed. The question does not, it seems to me, admit of any doubt. The contention that the local government of Prince Edward Island could alone exercise this prerogative right in the Province is untenable. The Lieutenant-Governors, no doubt, in the performance of certain of their duties as such under the British North America Act, may be said to represent Her Majesty, in the same sense and as fully, perhaps, as Her Majesty is represented, for instance, by justices of the peace, constables and bailiffs, in the execution of their duties. But it is the first time that I hear it contended, as has been done in this case, that the Lieutenant-Governor in a Province, on matters not exclusively left to the Provinces under the British North America Act, could ever use Her Majesty's name and prerogatives to defeat Her Majesty's rights and prerogatives. Not less extraordinary, to my mind, is the dictum of the court below, that if Her Majesty had proceeded in the Exchequer Court at Ottawa to recover judgment for this indebtedness, the Court of Prince Edward Island, if applied to, would grant a prohibition to prevent the process of the Exchequer Court from being enforced.

Appeal allowed with costs.

THE LIQUIDATORS OF THE MARITIME BANK,
 APPELLANTS;
 AND
 HER MAJESTY THE QUEEN,
 RESPONDENT.

1888*
 Nov. 20, 21

1889*
 Dec. 14.

On Appeal from the Supreme Court of New Brunswick.

[Reported 17 Can. S. C. R. 657.]

Pr rogative of Crown—Insolvent Bank.

The Queen is the head of the constitutional government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government.

The prerogative privilege to priority over other creditors of equal degree belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of an insolvent bank. (1)

[658] Appeal from a decision of the Supreme Court of New Brunswick (2) allowing an appeal from a pro forma judgment of the Chief Justice in favour of the liquidators of the Maritime Bank.

The Maritime Bank having become insolvent a claim was made by the Dominion Government for payment in priority to other creditors of two sums on deposit, one amount being placed in the bank by the Receiver-General to his own credit and subject to his order, the other having been deposited under the following circumstances.

The Dominion Safety Fund Life Association, a life insurance society doing business in St. John, N.B., on the

*Present:—Sir W. J. RITCHIE, C.J. and STRONG, TASCHEREAU, GWYNNE and PATTERSON JJ.

(1) [See preceding case].

(2) 27 N.B. Rep. 351. [The judgments of the Supreme Court of New Brunswick are not given here as they are occupied in discussing the effect of the bank and insurance Act.]

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assessment plan, was obliged to deposit \$50,000 with the Minister of Finance for a license. \$45,000 of this amount was deposited by the association in the Maritime Bank and a deposit receipt forwarded to the Minister. This receipt stated that the amount was payable to the Minister of Finance in trust for the association. The balance of the \$50,000 being deposited the receipt was accepted as a deposit of the \$45,000, and a license issued to the company which was renewed from year to year. The bank failed in September, 1887 and a demand was afterwards made upon the association for securities to replace the \$45,000. Up to 1888 the name of the association was among the companies mentioned in the yearly returns published in the Canada Gazette as licensed to do business.

The Government filed a claim against the liquidators of [659] the bank for the two amounts and two questions were raised and contested before the New Brunswick courts, namely, 1. Is the Dominion Government entitled by virtue of the royal prerogative to claim payment of money due from the bank in priority to other creditors? 2. Was the said sum of \$45,000 the money of the Government and subject to the prerogative right, or was it the money of the association?

The Supreme Court of New Brunswick decided that the Crown was entitled to priority of payment in respect to both sums. The liquidators appealed from such decision to the Supreme Court of Canada.

A. A. Stockton and C. A. Palmer for the appellants.

Weldon, Q.C. and Barker, Q.C. for the respondent.

[660] RITCHIE C.J.:—

The Maritime Bank of the Dominion of Canada, previous to March 7, 1887 carried on business as bankers at the city of St. John under the Bank Act. Having become

insolvent they, on that day, stopped payment and ceased to do business, and proceedings were afterwards taken for winding up the bank's affairs under the provisions of the winding-up Act. At the time of the bank's failure they had on deposit to the credit of the Receiver-General of Canada two sums of money: one of \$15,197.57 and the other of \$45,000. The first sum represented public moneys of the Government of Canada deposited in the bank and lying there to the credit of the Receiver-General and subject to his order. The other sum of \$45,000 was deposited in the bank by the Dominion Safety Fund Life Association to the credit of the Minister of Finance.

As to the sum of \$15,197.57 this was unquestionably a Crown debt as to which I think the claim of the Crown to priority must prevail. In Bacon's Abr. (1) it is said: "Where a statute is general and thereby any prerogative, right, title or interest is divested or taken from the [661] King, in such case the King shall not be bound unless the statute is made by express words to extend to him."

This has been repeatedly recognised and adopted as a correct exposition of the law; and the Interpretation Act emphasises this principle by enacting that: "No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby." (2)

It is to my mind, abundantly clear, therefore, that the prerogatives of the Crown cannot be affected except by clear legislative enactment, and it is equally clear that the prerogative of the Crown runs in the colonies to the same extent as in England.

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(1) Prerogative (K.) 5.

(2) R.S.C. c. 1, s. 7, sub-s. 46.

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But it is said this priority right of the Crown to be preferred before other creditors is taken away by the Bank Act, which by sect. 79 enacts that: "The payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency."

But not a word is said indicating an intention to interfere with or take away the rights of the Crown. The first charge here referred to is, in my opinion, the first charge as between the ordinary creditors of the bank, but subject where the Crown is a creditor to the prerogative rights of Her Majesty, and the section must be read as if the words "save and except the prerogative rights of the Crown" had been added, but which were, in fact, wholly unnecessary, as the Crown not being named expressly or by implication the law saved and excepted those rights.

In the case of *In re Oriental Bank Corporation* (1) Chitty J. says: "It is settled law that on the construction of the Companies Act, 1862, the Crown is not bound; [662] the Crown not being named, and there being no necessary implication arising from the Act itself by which the Crown's prerogative is affected or taken away. That is the short statement of the decision of the Court of Appeal in the case of *In re Henley & Co.* (2). . . . No distinction was drawn in argument, and very properly, between the rights and prerogatives of the Crown suing in respect of imperial rights and the rights of the Crown with regard to the colonies." I entirely agree with the court below that the Crown is not bound either by the bank or winding-up Act, and therefore, with respect to the sum of \$15,197.57, being public moneys of the Government of Canada deposited in the bank and, there-
 unquestionably a debt due to the Crown, Her Majesty's claim to priority over the note holders and

(1) 28 Ch. D. 643, 647, 649.

(2) 9 Ch. D. 469.

other creditors of the bank in equal degree must prevail, and as regards this amount the appeal must be dismissed.

The second sum of \$45,000, for which the court below held the Crown was entitled to the like priority, raises a very different and much more difficult question.

It cannot be denied that whoever receives money of the Crown becomes the immediate debtor of the Crown, but it appears to me that the real question in this case in reference to this sum of \$45,000 is: Was this money received by the bank as the money of the Crown or did it ever cease to be the money of the association? In other words: Did it ever become a Crown debt so as to be entitled to priority?

[The remainder of the judgment is occupied in discussing this question. The learned Chief Justice was of opinion that the sum in question never became a Crown debt].

STRONG, J :—

The facts of this case sufficiently appear from the statements contained in the judgments delivered in the court below and in this court upon the present appeal and I need not repeat them.

As regards the general question of the right of the [668] Crown, claiming in the administration of assets under bankruptcy, insolvency or winding-up proceedings in respect of a simple contract debt to priority over other simple contract creditors, I have already stated my opinion in a judgment delivered in the case of *The Queen v. The Bank of Nova Scotia* (1), and as I adhere to that judgment it will be sufficient for me to refer to it for the reasons and authorities upon which the conclusion now arrived at is founded. I have heard nothing in the argument of this appeal in any way impeaching the authority of the three late cases of *In re Oriental Bank*

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Corporation (1), *In re Henley & Co.* (2), *In re Bateman's Trust* (3), upon which my opinion in the case of *The Queen v. The Bank of Nova Scotia* (4) was based, and no new argument against the general right of the Crown to priority has been put forward in the present case. The argument founded upon the enactment which now forms sect. 79 of the Banking Act was urged in the former case, and although it is not noticed in my judgment was then duly considered. It then appeared to me that the section in question did not take away or in any way interfere with the common law right of the Crown to priority, and after further consideration I still retain that opinion, This 79th sect. is in these words:

"The payment of the notes issued by the bank and intended for circulation, then outstanding, shall be the first charge upon the assets of the bank in case of its insolvency.

It is to be observed that this section does not give the holders of notes any charge upon the property or assets of the bank ab initio, but only a first charge "in case of its insolvency." In the administration of assets whether in bankruptcy, insolvency or winding-up proceedings, as [669] also in the case of the administration of the estate of a deceased debtor, all debts form a charge upon the assets according to their priorities. This section is, therefore, only equivalent to a declaration that the note holders should be entitled to priority of payment out of the assets, if indeed it is as strong as an expressed declaration to that effect would have been. Then, for the reasons and upon the authorities stated by me in my former judgment before referred to, it seems clear that such an expressed declaration, the Crown not being named,

(1) 28 Ch. D. 643.
 (2) 9 Ch. D. 469.

(3) L. R. 15 Eq. 355.
 (4) 11 Can. S. C. R. 1; ante p. 391.

would have been insufficient to have taken away the right of the Crown to be paid in priority to all other simple contract creditors.

I am therefore of opinion that in respect of the sum of \$15,197.57, the money of the Crown deposited in the bank by the Finance Minister, this appeal is wholly unfounded.

[The remainder of the judgment is occupied in discussing the claim to priority in respect of the \$45,000. The learned Judge was of opinion that the Crown was entitled to priority in respect of this sum also.]

TASCHEREAU, J:—

As to the \$45,000 I would allow this appeal on the ground that these moneys do not belong to the Crown.

First.—The Insurance Act requires the deposit to be made in securities of a particular description. The Minister of Finance has no authority to take part of the amount in money.

Secondly.—The license granted to an insurance company, under cap. 124, R.S.C., is not a license by the Crown but a license by the Minister of Finance; and the deposits required by the Act are also made into the hands of the Minister of Finance, as *persona designata*. They are not deposited with the Crown as Crown moneys. [672] This very sum was not deposited to the credit of the Crown. They do not and cannot form part of the consolidated revenue of the country. This very contestation fully demonstrates it. In whose interest is it carried on? Clearly in the interest of the insurance company alone. The Crown has no interest whatever in the result of the case. I agree for these reasons and those given by my brother Patterson that the appeal should be allowed on this ground.

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As to the item of \$15,000 I agree that this appeal should be dismissed for the reasons given by His Lordship the Chief Justice. The Crown is not mentioned in the Banking Act, consequently, under the Interpretation Act, the prerogative right of priority remains unaffected thereby.

GWYNNE, J: [After discussing the effect of the provisions in the Bank Act and concluding that the right of the Dominion Government to claim any preference by virtue of the royal prerogative was excluded by the terms of the Act, the learned Judge continued, p. 677 :—]

This view seems also to me to be supported by sect. 103 of the Winding-up Act, 49 Vict. c. 129, which imposes upon liquidators of an insolvent bank the obligation, as the first duty they have to discharge, to ascertain as nearly as possible the amount of the notes of the bank actually outstanding in circulation, and to reserve until the expiration of two years at least after the date of the winding-up order, or until the last dividend if that is not made until after the expiration of said two years, dividends upon such parts of such amount reserved in respect of which claims should not have been made in the liquidation, at the expiration of which time, and not until then, the amount reserved in respect of outstanding notes and for which no claim should then have been made, becomes applicable to other purposes of the liquidation. I am, however, of opinion that the recognition of such a right in the Dominion Government as the exercise by it of the particular prerogative relied upon is not warranted by the letter or spirit of the British North America Act. By the special ordinance of the old Province of Lower Canada, passed in 1840, 4 Vict. c. 30, consolidated in cap. 37 of the Consolidated Statutes of Lower Canada, all preferential lien of the Crown upon any lands and tene-

ments situate within the limits of the said province, whether arising out of any deed, judgment, recognizance, judicial act or proceeding, or any instrument or document, and every privileged right, claim, or charge from whatever cause resulting whereby any real estate in Lower Canada should be affected or charged, was wholly done away with, save only such preference as the Crown in like manner as all other persons should obtain by priority [678] of registration under the provisions of the Act ; and upon the 1st August, 1866, the Civil Code of Lower Canada became law in virtue of 29 Vict. c. 41. By art. 1994 of this code it was enacted as follows :—

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“ Art. 1994, C.C.—The claims which carry a privilege upon movable property are the following, and when several of them come together, they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom.

“ 1. Law costs and all expenses incurred in the interest of the mass of the creditors.

“ 2. Tithes.

“ 3. The claim of the vendor.

“ 4. The claims of creditors who have a right of pledge or of retention.

“ 5. Funeral expenses.

“ 6. The expenses of the last illness.

“ 7. Municipal taxes.

“ 8. The claim of the lessor.

“ 9. Servants' wages and sums due for supplies of provisions.

“ 10. The claims of the Crown against persons accountable for its moneys.

“ The privileges specified under numbers 5, 6, 7, 9 and 10 extend to all the movable property of the debtor, the

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others are special and affect only some particular objects.”

This article is entered in the code as having been the old law of the Province of Lower Canada, not as new law ; at the time, therefore, of the passing of the British North America Act, which is the sole constitutional charter of the Dominion of Canada, there did not exist, nor did there ever exist within that part of the late Province of Canada formerly constituting the Province of Lower Canada, any preferential right in the Crown to have such a claim as that of the Dominion of Canada now under consideration paid in priority to the claims of any other creditor of an insolvent debtor, and to this effect is the judgment in *The Exchange Bank of Canada v. The Queen* (1).

By an Act of the Parliament of the late Province of Canada passed in 1851, 14 & 15 Vict. c. 9, all preferential [679] lien of the Crown upon lands of its debtors, situate in that part of the late Province of Canada formerly constituting the Province of Upper Canada, was abolished, save only such preference as should be obtained by priority of registration under the provisions for that purpose contained in the Act. And by another Act of the Parliament of the Province of Canada passed in 1866, 29 & 30 Vict. c. 43, intituled “An Act to amend the law of Upper Canada relating to Crown debtors,” after reciting among other things that it was desirable that all bonds or covenants made, and debts due by a subject to the Crown should be placed on the same footing as if they were made or due from a subject to a subject, it was enacted:—1. That no bond, covenant or other security thereafter to be made or entered into by any person to Her Majesty, her heirs or successors, or to any person on behalf of, or in trust for, Her Majesty, her heirs or successors, should bind the real or personal property of such person so making or entering into such bond, covenant, or other security, to any further, other or greater

(1) 11 App. Cas. 157.

extent than if such bond, covenant or other security had been made or entered into between subject and subject of Her Majesty, and

2nd. That the real and personal property of any debtor to Her Majesty, her heirs or successors, for any debt thereafter contracted should be bound only to the same extent and in the same manner as the real and personal property of any debtor where a debt is due from any subject of Her Majesty.

At the time, then, of the passing of the British North America Act Her Majesty had not, in virtue of her royal prerogative, any preferential claim for payment of the debts due to the Crown in Upper Canada, in priority to the claims against the same debtor of any of Her Majesty's subjects, all of whom were placed on the same footing with the Crown in respect of the debts due to [680] them respectively ; and in that part of the Province of Canada formerly constituting the Province of Lower Canada no prerogative right existed to have payment made of ordinary Crown debts in priority to the claims of other creditors of the same debtor, nor any right save only the limited statutory right vested in the Crown in virtue of the law as it is expressed in Art. 1994 of the Civil Code, against persons accountable to the Crown for its moneys—that is to say, as explained in *The Exchange Bank of Canada v. The Queen*, (1) against persons employed in the collection of the revenue and bound to account for the moneys collected by them and not to apply them to their own use.

Now, the British North America Act has not repealed or annulled the above provisions of the statute law of the late Province of Canada. There is nothing in that Act which can be construed as having, either expressly or by implication, any reference to any prerogative right being vested in or exercisable by the Dominion Govern-

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ment enabling it to recover and enforce payment of debts due to it in priority of the claims of, and debts due to, other creditors of the same debtor. It is clear, therefore, that the Dominion Government is not invested with, and has not, any right in virtue of Her Majesty's royal prerogative, or otherwise, to have a debt due to it paid in priority of debts due by the same debtor to other creditors where such debt accrued due to the Dominion Government within either of those provinces of the Dominion of Canada which formerly constituted the Province of Canada. Now, the fact that the debt of \$15,197.57 due to the Dominion Government by the Maritime Bank of the Dominion of Canada arises by reason of a deposit made in the bank at its place of business in St. John, in [681] the Province of New Brunswick, can, in my opinion, make no difference. The chief seat of business of the bank, it is true, is declared by the Act of incorporation to be the said city of St. John, but the bank has its corporate existence, and the power to transact banking business, in every Province of the Dominion. It has no limited existence, if that would make any difference. The debt due by the bank to the Dominion Government is as much due at the seat of Government of the Dominion at Ottawa, where no such prerogative as that relied upon exists, as it is due at the chief seat of business of the bank. The prerogative right of claiming priority in payment of debts due to the Dominion Government must, in my opinion, exist throughout the whole of the Dominion, if it exist at all. There is nothing in the letter of the British North America Act which warrants the contention, nor are we, in my opinion, required by the spirit of the Act to hold, nor should we be justified in holding, that the Dominion Government can invoke and exercise the royal prerogative relied upon to enable

it to recover deposits made by it in a banking institution at its place of business in one of the provinces of the Dominion when it could not invoke or exercise the like prerogative in respect of deposits made in the same bank at its places of business in others of the provinces. But that the royal prerogative insisted upon can be invoked and exercised by the Dominion Government is rested upon a claim of right, which is relied upon as above, and de hors, the constitutional charter of the Dominion of Canada, namely, that all moneys due to the Dominion Government are debts due to Her Majesty, and that the royal prerogative relied upon attaches at common law in respect of all debts due to Her Majesty. Now, I do not at all question the authority of *In re Bateman's Trust* (1), [682] or any like case, but I must say that, in my opinion, we make a very great mistake if we treat the Dominion of Canada, constituted as it is, as a mere colony. The aspirations of the founders of the scheme of confederation will, I fear, prove to be a mere delusion if the constitution given to the Dominion has not elevated it to a condition much more exalted than, and different from, the condition of a colony, which is a term that, in my opinion, never should be used as designative of the Dominion of Canada.

However, the question now before us simply is, whether such incongruity exists in the British North America Act, which is the constitutional charter of the Dominion, as that the Dominion Government can invoke and exercise what, as regards the circumstances and conditions of this Dominion, may be said to be a most unjust and obnoxious privilege in one of the provinces of the Dominion which it cannot exercise in all the others. In view of the fact that at the time of the passing of the

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British North America Act the particular prerogative right insisted upon did not exist in the late Province of Canada, and in view of the fact that there is no provision in the Act annexing the right to the constitution of the Dominion, and of the fact that the prerogative does not under, or since the passing of, the British North America Act exist in those parts of the Dominion consisting of the Provinces of Quebec and Ontario, and lastly, in view of the fact that there is nothing in the Act requiring or justifying the conclusion that such an incongruity exists in the constitutional charter of the Dominion as that the Dominion Government should have a right to invoke and exercise a royal prerogative in one of its provinces which it could not exercise in all the others, the necessary implication, in my opinion, arises that the Dominion Government has no right to invoke or exercise the particular [683] prerogative relied upon in any part of the Dominion. By so holding we shall be acting more in harmony with the ideas prevailing at the present day—with the spirit of the age—and, in my opinion, with the letter and spirit of the constitutional charter of the Dominion. The Dominion Parliament itself, by an Act passed in its very first session, 31 Vict. c. 37, intituled, "An Act respecting the security to be given by officers of Canada," seems to have entertained the opinion in conformity with the opinion of the Parliament of the late Province of Canada as expressed in the statutes of that province above referred to, that the Dominion Government should not have the privilege insisted upon in any part of the Dominion, even in the case of the persons who alone are those who are designated in art. 1994, C. C., as accountable to the Government for its revenue collected by them.

By this Act, which was passed for the purpose of requiring every person appointed upon or after the 1st day of July, 1867, to any civil office or employment of public trust, or concerned in the collection, receipt, disbursement, or expenditure of any public money under

the Government of Canada, to give bonds executed by themselves with such sureties for the due performance of the trusts reposed in them, and for the due accounting for the public money entrusted to them respectively, it was expressly provided that no such bond or security, given under the Act, to Her Majesty, her heirs and successors, should constitute any other or greater lien or claim upon the lands or tenements, goods or chattels of such person than if such bond had been given to one of Her Majesty's subjects. Debts accrued by bonds given by persons employed in the collection and receipt of the public funds of the Dominion being thus placed on the same footing as debts secured by bonds executed by a subject to a subject, the Dominion Government cannot, [684] in my opinion, consistently with the spirit of the Act, claim priority in respect of an ordinary debt accrued due by deposit in a bank to secure which no bond is taken or required. For all the above reasons I am of opinion that the appeal should be allowed and with costs.

PATTERSON J:—

The general rule of English law which gives the Crown, when claiming as a creditor, priority over other creditors of equal degree is not questioned on this appeal, nor is it contended that there is anything in the Winding-up Act of the Dominion (1) to restrict the operation of that rule in the distribution of the assets of an insolvent corporation.

There may be practical force in the suggestion that the law would be more in consonance with the real life and spirit of the time if the public in the aggregate, nominally represented by the Crown, and the public as individuals, were made to stand in this particular on the same footing. I understand it to be so in the Province of Quebec (2), and it may perhaps be so in

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(1) R. S. C. c. 129.

(2) *Exchange Bank of Canada v. The Queen*, (11 App. Cas. 157.)

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Ontario under the legislation of the old Province of Canada (1). But the general rule, to the extent to which it was in question before this court in *The Queen v. The Bank of Nova Scotia* (2), does not strike me as being, since that decision, open to controversy in this court. The important questions in this appeal did not arise in that case.

The first is whether, in the winding-up of one of the incorporated banks to which the Bank Act (3) applies, the notes of the bank are a first charge on the assets as against the Crown as well as against the other creditors. This question affects both the claims of \$15,000 and \$45,000.

[685] The second question affects only the \$45,000 claim, and it is whether that is properly a Crown debt. The solution will depend on a consideration of the Insurance Act (4).

Both questions have been answered in the court below in favour of the Crown, the arguments for that view being presented in able judgments by the learned Chief Justice and Mr. Justice Tuck.

It is impossible to deny the force of the views presented by those learned judges. I have hesitated a long time before venturing to differ from them, and I do not now adopt a different conclusion without some lingering distrust of its soundness, particularly with regard to the second point.

[The learned Judge then discussed the provisions of the Bank and Insurance Acts and concluded that the Dominion Government had not the priority claimed.]

Appeal dismissed as to the sum of \$15,197.57 and allowed as to the sum of \$45,000 without costs to either party.

(1) 29-30 Vict. c. 43; R. S. O. 1887, c. 94. (3) R. S. C. c. 120.

(2) 11 Can. S. C. R. 1; ante p. 391. (4) R. S. C. c. 124.

<p>WILLIAM F. DANAHER,</p> <p style="text-align: right;">APPELLANT ;</p> <p style="text-align: center;">AND</p> <p>B. LESTER PETERS AND JOHN R. MARSHALL,</p> <p style="text-align: right;">RESPONDENTS.</p>	<p>1889*</p> <p>Feb. 21, 22 ;</p> <p>June 14.</p>
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<p>JOHN O'REGAN,</p> <p style="text-align: right;">APPELLANT ;</p> <p style="text-align: center;">AND</p> <p>B. LESTER PETERS,</p> <p style="text-align: right;">RESPONDENT.</p>	
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On Appeal from the Supreme Court of New Brunswick.

[*Reported 17 Can. S. C. R. 44.*]

New Brunswick Liquor License Act, 1887—Prohibition of sale of liquor—Disqualifying liquor sellers.

The New Brunswick Liquor License Act, 1887, provides that applications for licenses must be accompanied by a certificate that the applicant is a fit person to hold a license and his premises suitable for the purpose, and that such certificate shall be signed by at least one-third of the ratepayers for the polling sub-division. The Act also provides that no person holding a license shall be qualified to sit on the commission of the peace, to be a member of a municipal council or a teacher in a public school : *Held*, that these enactments were valid.

Appeal from a decision of the Supreme Court of New Brunswick, refusing a writ of prohibition to restrain the defendants from enforcing a conviction for selling liquor without license, contrary to the provisions of the Liquor License Act, 1887 (1).

* *Present*:—STRONG, FOURNIER, TASCHEREAU, GWYNNE, and PATTERSON, JJ.
 (1) 50 Vict. (N. B.) c. 4.

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 Statement.

This appeal raises only two questions which are dealt with in the following judgments of the Supreme Court. One question is as to the constitutionality of the Act; the other as to the validity of licenses issued under it in the city of St. John.

The Act provides that applications for licenses must be accompanied by a certificate of the applicant's fitness to hold a license, and that the premises for which it is asked are suitable, signed by at least one-third of the ratepayers for the polling sub-division established for the purposes of the last previous Dominion or Provincial election for the district for which the license is asked. It was contended by the appellants that this provision enabled the ratepayers, by acting in concert, to prevent the granting of any licenses, and that it was, therefore, in effect a measure prohibiting the sale of intoxicating liquors, and ultra vires of the local legislature.

Another provision of the Act was that no holder of a license should be qualified to sit on the commission of the peace, to be a member of a municipal council or a teacher in the public schools. The contention of the appellants under this provision was that it interfered with the [46] public rights of persons engaged in the liquor business and, by affixing a stigma to that business, was calculated to prevent persons engaging in it, which made it a measure in restraint of trade and ultra vires of the local legislature.

The power to grant licenses under this Act is vested in the municipal councils and, for the city of St. John, in the mayor, who has all the powers of a council. Applications for license in cities and incorporated towns are to be considered at a meeting of the council (the expression council in relation to St. John meaning the

mayor), to be held not later than the first day of April in each year. Anything required to be done at, or on or before, a meeting of council, when no other date is fixed therefor, shall be done in St. John on a day to be fixed by the mayor, of which he shall give notice by advertisement in a newspaper.

The mayor of St. John gave notice for, and received and considered applications for licenses on the 26th day of April. The appellants, who were applicants for a retail and wholesale license respectively, appeared before him on that day and protested against any licenses being issued, and they afterwards sold liquor without license, and were convicted of an offence against the Act for so doing by the respondent Peters, police magistrate for the city. They then applied for, and obtained, a rule nisi for a prohibition to prevent the said magistrate and the chief of police from enforcing the conviction. On the return of the rule nisi it was argued before the full court and discharged. This appeal was then brought to the Supreme Court of Canada.

The different sections of the Act on which the decision of this court and that of the court below is founded are set out in the judgment of Gwynne, J.

McCarthy, Q.C., and *Milledge* (*Quigley* with them) for [47] the appellants. That the power to prohibit absolutely the sale of liquor in Canada is vested in the Dominion Parliament is settled by authority: *Russell v. The Queen* (1); *City of Fredericton v. The Queen* (2).

It is not necessary that prohibition should appear as a feature apparent on the face of the Act. If it can be utilized as a means for effecting prohibition it is beyond the legislative authority of the province.

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(1) 7 App. Cas. 829; ante vol. 2, p. 12. (2) 3 Can. S.C.R. 505; ante vol. 2, p. 27.

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There is no such thing in England as an unconstitutional Act of Parliament. The English decisions on construction of statutes must be looked at in the light of our different position. *White v. Tyndall* (1); *Leader v. Duffey* (2); *Caldwell v. McLaren* (3); can only be upheld on a strict and literal construction of statutes.

The learned counsel referred also to *Hodge v. The Queen* (4), and the decision of the Privy Council in *Re Dominion Liquor License Act, 1883* (5).

Jack, for the respondents, cited the following cases and authorities: *Sharp v. Dawes* (6); *Pearse v. Morrice* (7); *Le Feuvre v. Miller* (8); *Siddell v. Vickers* (9); *The [48] People v. Allen* (10); *Maxwell on Statutes* (11); *Severn v. The Queen* (12); *Bank of Toronto v. Lambe* (13); *R.S.N.B.* (14).

STRONG J :—

Was of opinion that the appeals should be dismissed.

FOURNIER J:—

I am of opinion that these two appeals should be dismissed with costs for the reasons mentioned in the very elaborate notes of the judges of the court below.

TASCHEREAU J:—

I am of opinion that whether the mayor could hold the meeting for the issue of licenses after the first of April or not is immaterial in this case (Danaher's). If he could do so, as he has done, the appellant stands without a license; if he could not do so the result is the same, the appellant is without a license and could not sell

(1) 13 App. Cas. 263.

(2) 13 App. Cas. 294.

(3) 9 App. Cas. 392.

(4) 9 App. Cas. 117; *ante* vol. 3, p. 144.

(5) *Ante* p. 342.

(6) 2 Q.B.D. 26.

(7) 2 A. & E. 84.

(8) 8 E. & B. 321.

(9) 39 Ch. D. 92.

(10) 6 Wend. 486.

(11) Ed. of 1875, p. 334, *et seq.*

(12) 2 Can. S.C.R. 70; *ante* vol. 1, p. 414.

(13) 12 App. Cas. 575; *ante* p. 7.

(14) Vol. 3, p. 1006.

liquor without infringing the provisions of the Liquor License Act. As to the constitutionality of the Act there can be no doubt. This is not a statute to prohibit, it is a statute to regulate, to permit under certain conditions. If these conditions are not fulfilled it may be that the consequences are that the sale of liquor is virtually prohibited, but that consequence cannot render the Act unconstitutional.

As to O'Regan's case, he also sold liquor without a license. Whether he sold wholesale or retail is immaterial. It is not because he sold a large quantity that he can claim to have the action against him dismissed.

GWYNNE J:—

The first question which arises in these cases is as to the authority and jurisdiction of the mayor of the city of St. John, in the Province of New Brunswick, under [49] the Provincial Statute 50 Vict. c. 4, to issue the licenses issued by him on the 26th April, 1888. In the construction of this obscure Act all that we are concerned with is as to its application to the city of St. John in relation to the issue of licenses to sell liquors therein. We are bound to find, if we can, an intelligible meaning for the seeming obscurity and this, I think, a careful study of the Act will enable us to do, although not, perhaps, without some difficulty.

Sect. 2, sub-sect. 4, enacts in substance, in so far as the city of St. John is concerned, that by the word "council" where it occurs in the Act standing thus alone, shall be understood, unless the context otherwise requires, "the mayor of the city" whom the Act invests with all the powers and duties which in other municipalities are imposed upon the councils of the municipalities, and then sect. 8 enacts that:

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" Every application for a license to sell liquors (in the city of St. John) either by wholesale or retail shall be by petition of the applicant " to the mayor of the city.

" 9. Every petition for a license shall . . be filed with the chief inspector " of the city " on or before the first day of March " in each year.

" 13. The chief inspector shall cause to be posted up in his office the name of each applicant for license, the description of license applied for, and the place, described with sufficient certainty, where such applicant proposes to sell, at least fourteen days " before the first day of April.

" 15. It shall be the right or privilege of any person residing in the ward for which the license is required to file objections in writing to the granting of any license. The objections which may be taken to the granting of a license may be one or more of the following :

" (1) That the applicant is of bad fame or character or of drunken habits, or has previously forfeited a license ; or that the applicant has been convicted of selling liquor without license within a period of three years ; or

" (2) That the premises in question are out of repair, or have not the accommodation hereby required, or reasonable accommodations if the premises be not subject to the said regulations ; or

" (3) That the licensing thereof is not required in the neighbourhood, or that the premises are in the immediate [50] vicinity of a place of public worship, hospital or school, or that the quiet of the place in which such premises are situate will be disturbed if the license is granted."

" 17. Any petition or memorial against the granting of a license shall be lodged with the chief inspector not less

than four clear days before the day . . . on which the application shall be considered.

“ 18. The chief inspector shall keep a list posted in his office for three days previous to such day of all certificates and petitions lodged with him as aforesaid, and every such petition or memorial shall be open for public inspection without fee.”

“ 20. Every application for a license, and all objections to every such application shall be investigated by the chief inspector ” of the city ;

“ (1) Every such investigation shall be open to the public . . .

“ (2) The chief inspector may, at his discretion, adjourn such investigation from time to time . . .

“ 21. On every application for a license, the chief inspector shall report in writing ” to the mayor of the city, “ and such report shall contain,” etc.

“ 22. The inspector shall with his report return to the mayor of the said city the evidence taken by him at any investigation, and such report and evidence shall be for the information of the mayor of the city, who shall nevertheless exercise his own discretion on each application.”

Then sect. 23 enacts that—

“ Whenever by this Act anything is required to be done at a meeting, or on or before a meeting of council, and no other date is fixed therefor in this Act, *such act or thing may be done in the city of St. John on or before a date to be named and fixed by the mayor of the said city, of which date he shall give seven days previous public notice by advertisement in one or more of the daily newspapers published in the city.*”

This section read in connection with sect. 17 shews that the day upon which the applications for licenses in the

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city of St. John are to be considered must be a day to be appointed and fixed by the mayor, of which seven days notice by advertisement in one or more of the daily newspapers published in the city must be given, and, therefore, that such day may be, and indeed, generally, perhaps, would be, a day subsequent to the first of April in each year.

I have stated above what appears to me to be the correct reading of sects. 17 and 18 in relation to the issuing of licenses in the city of St. John, and that this is the correct reading will, I think, appear by applying to their construction this 23rd section.

Sect. 17 literally reads as follows :

“ Any petition or memorial against the granting of a license shall be lodged with the chief inspector not less than four clear days before the day of the meeting of the council at which the application shall be considered.”

Now, this expression, “ Not less than four clear days before the day of the meeting of the council at which the application shall be considered,” supplies the very condition precedent required by sect. 23 to determine its application to sect. 17.

The lodging a petition or memorial against the granting of a license which has been applied for, is a thing required by the Act to be done “ before a meeting of council, and no other day is fixed therefor in this Act.”

It must, therefore, in the city of St. John, be done by force of sect. 23 not less than four clear days *before a day to be named and fixed by the mayor of the city* for taking applications for licenses into his consideration, of which day seven days previous public notice by advertisement in one or more of the public newspapers published in the city must be given. In so far, therefore, as the city

of St. John is concerned, a day to be fixed by the mayor, of which seven days public notice, as aforesaid, is given, is the day upon which application for licenses in the city of St. John are to be considered, and such day may be subsequent to the first of April in each year, notwithstanding the ingenious arguments of the learned counsel for the appellants founded upon the words, "not later than the first day of April in each and every year," in the 27th section, the sentence in which these words [52] occur, properly understood, having no application whatever to the city of St. John.

That section enacts that "all applications for license other than in cities and incorporated towns shall be presented at the annual meeting of the council of the municipality, and shall then be taken into consideration, and in cities and incorporated towns at a meeting to be held not later than the first day of April in each and every year."

As to the first branch of the sentence it is expressly limited to municipalities other than cities and incorporated towns. The word "council" as it is used in that sentence cannot be construed as coming within sub-sect. 4 of sect. 2 of the Act; the context requires that it should not be so construed; what the sentence relates to is an annual meeting of a council of a municipality other than a city or an incorporated town. So likewise, as it is the manifest design of the Act to make special provision for the city of St. John different from the provision made for all other cities and for all incorporated towns, the city of St. John cannot be comprehended under the words in the latter clause of the sentence, "and in cities and incorporated towns," etc. The cities and incorporated towns there referred to are these at the meeting of whose

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municipal councils the applications are to be presented; the word "meeting" as here used would be manifestly insensible as applied to the mayor of the city to whom, by sects. 8 and 21 read in the light of sect. 2, sub-sect. 4, applications for licenses in the city of St. John are to be presented. Moreover, the expression "council" is not used in the latter branch of the sentence at all, so that for these reasons it is apparent that the sentence has no application to the city of St. John as to which special provision is made quite different from that made for all other cities and for all incorporated towns. The same observation applies to sub-sect. 1 of sect. 27. The word [53] "council" as there used in connection with the words "at such meeting" refers to the municipal council of a municipality other than a city or incorporated town and to the municipal council of cities and incorporated towns in the previous sentence referred to, that is to say to cities whose councils receive and take into their consideration applications for licenses at a meeting of council held not later than the first of April in each year—in other words all cities except the city of St. John; the context requires that the word "council" in this sub-section is not to be read as meaning the mayor of the said city of St. John.

The word "council" in sub-sect. 2 and wherever it occurs in the other sub-sections can be applied in relation to the city of St. John to the mayor of the said city. Thus sub-sect. 3:

"The mayor of the city of St. John shall hear and determine all applications," etc.

"Sub-sect. 5. No objection from an inspector shall be entertained unless the nature of the objection shall be stated in his report furnished to the mayor of the city.

"Sub-sect. 6. Notwithstanding anything in this Act contained, the mayor of the said city may of his own motion," etc., etc.

Thus reading sect. 27 all argument based on the words in it "at a meeting to be held not later than the first day of April in each and every year" is removed, and these words have no application as regards the issuing of licenses in the city of St. John. Whether, therefore, the language of the section is imperative or directory is unimportant in the present case.

It was contended that in effect the Act operates as a total prohibition of the sale of liquor in the city of St. John and that it was therefore ultra vires and void. The argument in support of this contention was rested upon sects. 27 and 10. In so far as sect. 27 is concerned I have already, I think, shewn that it has no application to the [54] issuing of licenses in the city of St. John, and it is with this point alone that we are concerned.

Sect. 10 enacts that : "In case of an application for a license, the petition must be accompanied by a certificate signed by one-third of the ratepayers in a polling sub-division in which the premises sought to be licensed are situate, which polling sub-division shall be that established by law for the purposes of an election for the House of Commons, or if none such be established then the polling sub-division used for the last election."

The argument based upon this section was that it showed clearly the intention of the legislation to be that any number of ratepayers in a polling sub-division exceeding two-thirds should have the power of totally prohibiting the sale of liquor by refusing to sign the certificates for applicants for licenses. Then it was contended that sect. 31 authorises the majority of the rate-

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payers in a city or incorporated town to prohibit the sale of liquor by petitioning against the granting of licenses, and for those reasons it was contended that the Act was, in effect, an Act for the total prohibition of the sale of liquor in the city of St. John, and therefore *ultra vires* and void; but there is nothing in the language of the Act which would justify us in pronouncing the intention of the legislature to have been to enact a prohibition of the sale of liquors in a municipality or in any part thereof under colour of passing an Act upon the subject of municipal regulations relating to the sale of liquors, which is a subject clearly within the jurisdiction of the local legislatures.

The objections which alone the Act authorises to be urged by petition against the granting of a license to a particular person or for a particular house, enumerated in sect. 15, seem to be very reasonable grounds of objection as affecting the person and place sought to be licensed as regards the retail trade in liquors, and although these [55] objections may seem to be unreasonable if applied to a person or shop for which a license to sell liquors by wholesale is sought to be obtained, we cannot for that reason hold the object of the legislature to have been to effect prohibition of the trade of dealing in the sale of liquors under colour of an Act establishing municipal regulations affecting that trade. So neither can we hold that the certificate of approval of the fitness of the applicant to obtain a license, or of the place in which he proposes to carry on the trade required by the Act, however stringent the provision upon that subject is, has been enacted for the purpose of effecting a prohibition of the sale of liquors in any part of a municipality. The Act may be defective, also, in some particulars, as in the

absence of a provision (which was much relied upon) for supplying throughout the year the places of licensed persons dying, or being deprived of their licenses. So, likewise, it may to some seem to be reasonable, to others it may seem to be unreasonable, that a licensed tavern-keeper should not be eligible to serve as a trustee of schools or hold a place in the commission of the peace, or to be a member of a municipal council, etc., but defects or imperfections in the Act or provisions therein which may be, or may appear to some to be, unreasonable, will not justify us in pronouncing the true object of the Act to have been prohibition, total or partial, of the trade of dealing in the sale of liquors, under pretence of establishing municipal regulations upon that subject.

As to sect. 73, and the argument founded thereon as affecting brewers and distillers, we have no concern in my opinion in the present case with any consideration of that section or its effect upon brewers and distillers. The appeals must in both cases be dismissed with costs.

PATTERSON J:—

I agree that these appeals must be dismissed, and I do [56] not propose to discuss at much length the questions that have been debated before us.

The power of the local legislatures to provide for the issuing of licenses for the sale of spirituous liquors, either in large or small quantities, to limit the number of licenses, and to prohibit, under penalties, the sale of such liquors without license, cannot now be treated as an open question.

The contention for the present appellants is that the New Brunswick Liquor License Act, 1887, while professing merely to deal with the subject of licenses, contains provisions which, either from their inherent tendency or from the way in which they may be acted on, give the

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measure the effect of a prohibitory law, either as to the whole province and for all time, or as to particular localities and particular calendar years.

The larger question of the power of the province to prohibit the sale of intoxicating liquors within its own borders is not presented for discussion, and we have to deal only with questions which concede that total prohibition can be decreed only by the Dominion Parliament.

Three points have been made before us, but two of them may be dismissed with a few observations. They were, if I am not mistaken, raised for the first time in this court.

One relates to the requirement of a certificate signed by one-third of the ratepayers of the locality as a qualification for obtaining a license, and the other to the disqualification under sect. 76, of licensed persons for holding commissions of the peace or municipal offices. These provisions, it is urged, interfere with the freedom of individuals in the matter of engaging in the liquor trade by making their right to a license depend on the action of their neighbours and by attaching a stigma to [57] the business. The stigma may or may not be implied. There may be other motives for desiring that under a system of popular government the liquor seller shall control public affairs to as small an extent as possible without any more imputation against him or his calling than is implied by the exclusion of judges from the electoral franchise.

But the objections are too fanciful and far fetched to be seriously discussed without denying to the local legislature the right to prescribe the conditions on which licenses can be obtained. They assume a right in every man to demand a license ignoring the right of the legislature to limit the number.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

E. R. C. CLARKSON

(Defendant) APPELLANT ;

1890*
Jan. 21.
—

AND

WILLIAM RYAN

(Plaintiff) RESPONDENT.

On Appeal from the Court of Appeal for Ontario.

[Reported 17 Can. S. C. R. 251.]

Appeal, limitation of—Rev. Stat., 1887, c. 42, s. 2, Ont.

An Act of the Ontario Legislature provides that in certain cases no appeal shall lie to the Supreme Court of Canada without special leave : *Held*, that this enactment is not binding on the Supreme Court.

Appeal from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour, C.J., in favour of the plaintiff.

Foy, Q.C., for the appellant.

Aylesworth, for the respondent.

In the course of the argument the Chief Justice called attention to an order published in the record and purporting to be made by the Court of Appeal which gave defendant leave to appeal to the Supreme Court, he undertaking to ask no costs of such appeal.

*Present:—Sir W. J. RITCHIE, C. J., and FOURNIER, TASCHEREAU, GWYNNE, and PATTERSON, JJ.

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RITCHIE, C.J.:—The Court of Appeal was not justified in making this order and had no right to insert any undertaking as to costs which is a matter entirely in the discretion of this Court.

Foy referred to the Ontario statute requiring leave to appeal when the amount in controversy is under \$1,000. (1)

RITCHIE, C.J.:—We have repeatedly stated in this Court that we are not bound by that statute. The effect of this order is that the waiver of costs is a condition of the appeal. There was no necessity for an application for leave to appeal and if such leave were granted it should not be tramelled with conditions.

PATTERSON, J.:—The matter has been discussed in the Court of Appeal and there being no reported decision that the Ontario Act is ultra vires it has been acted upon.

RITCHIE, C.J.:—The matter has been before this Court more than once, appeals from Ontario being objected to on the ground that leave has not been granted under the Ontario Act, and it has been stated most unequivocally that this Court is not bound by the Act. If it is, then each Province could legislate so as to take away the juris-
 [254] diction of this Court altogether. In one case where the Court of Appeal refused leave to appeal, this Court

(1) [Rev. Stat. c. 42, s. 2, enacts as follows:—

“In any action respecting property or civil rights, whether for damages or for specific relief, no appeal shall lie to the Supreme Court of Canada without the special leave of such Court, or of the Court of Appeal, unless the title to real estate or some interest therein, or the validity of a

patent is affected; or unless the matter in controversy on the appeal exceeds the sum or value of \$1,000, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights.”]

granted it on that ground alone (1). And in a subsequent case where it was sought to raise the question again, we refused to hear it because it had been decided already. No person practising in Ontario, who has anything to do with this Court, can be ignorant of our position in regard to that statute. I do not wish it to be imagined that we have the slightest doubt as to our jurisdiction without regard to that Act, for to hold so would be to disturb numerous decisions of the Court.

[The remainder of the case is omitted as not bearing on the constitutional question.]

(1) *Forristal v. McDonald, Cassels' Digest* 406.

[The note of the above case is as follows:—

“On the 15th day of September, 1882, an appeal to the Court of Appeal for Ontario, in which the defendants were appellants and the plaintiff was respondent was dismissed. The matter in controversy in the action amounted to the sum of \$576.30 exclusive of costs. The defendants, on said 15th day of September, applied to the Court of Appeal under sect. 43 of the Judicature Act of Ontario (now Rev. Stat. c. 42, s. 2 *supra*), for special leave to appeal from judgment of said Court of Appeal to the Supreme Court of Canada, and the Court of Appeal refused to grant such special leave. The defendants thereupon made an application to Mr. Justice Fournier, in Chambers, for leave to appeal from said judgment of the Court of Appeal, or for an order that defendants be at liberty to give proper security to the satisfaction of the Supreme Court or a judge thereof, that they would effectually

prosecute their appeal, or for such further or other order as the Judge or Court might direct. This application was made on the 4th day of October, 1882, being within thirty days after the said judgment was pronounced. Mr. Justice Fournier finding that the point as to the validity of the section in question of the Judicature Act of Ontario had been raised by the application referred it to the full Court.

“In the course of the argument the Court expressed great doubts as to the constitutionality of sect. 43 of the Ontario Statute, but as the appellants' counsel abandoned the first alternative of his motion the Court exercising the powers conferred by sect. 31 of the Supreme and Exchequer Court Act, 1875, as amended by sect. 14 of the Supreme Court Amendment Act of 1879 ordered that the second alternative of the said motion should be granted and that the said appellants should be at liberty to pay the sum of \$500 into the Supreme Court to the credit of the Registrar thereof as security for the costs of the appeal.”]

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Argument.

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 Nov. 18.

1890*
 March 10.

LAURENT PIGEON (*Petitioner*),

APPELLANT;

AND

THE RECORDER'S COURT AND THE CITY OF
 MONTREAL,

RESPONDENTS.

*On Appeal from the Court of Queen's Bench for Lower Canada.
 (Appeal Side.)*

[*Reported 17 Can. S. C. R. 495.*]

*Markets—Butchers' Stalls, power to regulate and license—37 V. c.
 51, s. 123, sub-ss. 27, 31 (Q).*

A statute of the Province of Quebec gave to the council of the city of Montreal authority to regulate and license the sale in any private stall or shop in the city, outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold in markets : *Held*, affirming the judgments of the Courts below, that the enactment was intra vires of the Provincial Legislature.

Appeal from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), (1) confirming a judgment of the Superior Court which had dismissed the appellant's petition for a writ of prohibition.

[496] The petition had for its object the obtaining of a writ of prohibition enjoining the Recorder's Court and the city of Montreal from proceeding in the case before the said Recorder's Court, wherein the city of Montreal was complainant and the said appellant defendant. The

**Present* :—Sir W. J. RITCHIE, C. J., and STRONG, TASCHEREAU, GWYNNE and PATTERSON, JJ.

(1) M. L. R. 6 Q. B. 60. [The judgment of the Q. B. is omitted as not bearing on the constitutional question.]

complaint was to the effect that appellant, a butcher, had illegally exposed for sale on a private stall, outside of the public meat markets, meat ordinarily bought and sold on public meat markets, without having obtained a license from the city council, the whole in violation of by-law number 131, intituled "By-law concerning markets," then in force in the city of Montreal; the petition, praying for the writ of prohibition, alleged that the by-law, in virtue of which the city of Montreal was proceeding against the appellant, was ultra vires, and, consequently, had no legal existence. The corporation of Montreal answered the petition by pleading that the by-law and the statute upon which it rests are legal and constitutional and valid to all intents and purposes.

The by-law and the statute in question are referred to in the judgments.

Geoffrion, Q. C., and *Madore* for appellant.

Ethier for respondent.

RITCHIE, C. J., concurred with Taschereau, J.

STRONG, J :—

This was a proceeding in prohibition to restrain the Recorder's Court from proceeding to hear and determine an action, instituted by the city of Montreal against the present appellant to recover the fine imposed for an infraction of the by-law of the city, which required all persons exposing meat for sale in any private stall or shop outside of the public meat markets to take out a license, for which license the sum of \$200 was by the same by-law required to be paid. The appellant, who was, at the time of the action being brought, keeping a private stall for the sale of butchers' meat at the corner of St. Denis and St. Catharine streets, in the city of Mon-

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 —

Montreal, refused to submit to the by-law and to pay the license fee of \$200 for the year from May, 1886, to May, 1887.

Thereupon the city instituted an action in the Recorder's Court to recover the fine prescribed for breach of the by-law, upon which the appellant took proceedings in prohibition, making the Recorder's Court and the city, both parties defendants. A writ to appear and answer having been granted by the Superior Court, the city pleaded thereto: first, a peremptory exception insisting that the appellant was precluded from raising any objection to the by-law imposing the fee for the license, inasmuch as the city was entitled to the benefit of the prescription enacted by sect. 12 of 42 & 43 Vict., c. 53, the period of three months from the date of the passing of the by-law having elapsed before the commencement [499] of the action. Secondly, the city pleaded a general defence on the merits, insisting on the validity of the by-law and on the constitutionality of the statute pursuant to which it was passed.

The appellant having filed an answer and replication the parties went to proof, and the cause was subsequently heard before Mr. Justice Mathieu, in the Superior Court, who dismissed it, and the appellant having taken an appeal to the Court of Queen's Bench that court affirmed the judgment of the Superior Court. The present appeal was then taken to this court.

By the provincial statute, 37 Vict., c. 51, sect. 123, sub-sect. 27, the city of Montreal is authorized: "To establish and regulate public markets and private butchers' or hucksters' stalls, and to regulate, license or restrain the sale of fresh meats, vegetables, fish or other articles usually sold in markets."

By sub-section 31 of the same section it is enacted that the city shall have power: "To order that all kinds of live stock, and all kinds of provision and provender whatsoever, usually bought and sold in public markets that may be brought to the said city for sale, shall be taken to the public markets of the said city, and there exposed; and that neither the said live stock, nor the said provisions or provender shall be offered or exposed for sale, or be sold or purchased elsewhere in the said city than on the said public markets; but the said council may, if they deem it advantageous, by a by-law to be passed for that purpose, empower any person to sell, offer or expose for sale in any place beyond the limits of said markets or market stalls of the said city, meat, vegetables and provisions usually bought and sold on public markets, upon such person obtaining a license for that purpose from the said council, for which he shall pay to the city treasurer such sum as may be fixed by such by-law, and by conforming with the rules and regulations contained in the said by-law."

And by sub-section 32 of the same section further power was given to the city: "To impose a duty on all private marts in the said city, or that may hereafter be established therein for the sale of cattle, provision or provender, or of anything else whatsoever, that is usually sold in public markets, with power to regulate and fix the said duty as regards each particular mart as the said council may see fit."

[500] On the 9th of June, 1882, the city council of Montreal passed a by-law which contained amongst others the following provisions. By sect. 44 it was enacted that: "No person shall sell or expose for sale in any private stall or shop in the city, outside of the public

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meat markets aforesaid, any meat, fish, vegetables or provisions usually bought and sold on public meat markets, unless he shall have obtained a license from the said council as before provided."

Section 45.—"The said council upon the recommendation of the market committee may from time to time issue license under the hand of the mayor, to persons who desire to sell or expose for sale in such private stalls or shops outside of the said public meat markets as shall be designated in such licenses any such meat, fish, vegetables or provisions, provided the place so designated be not less than five hundred yards distant from the centre of any of the said public meat markets.

Section 46.—"For each and every such license there shall be paid to the city treasurer, by the person applying for the same at the time of his making such application, the sum of \$200.

Section 47.—"All licenses so issued shall expire on the first day of May, after the date thereof unless sooner revoked, and shall be renewable every year at the discretion of the said council."

And section 95 of the same by-law was in the words following:—"Any person violating and contravening any of the provisions of this by-law, for which a penalty is not hereinbefore provided, shall for each offence be liable to a fine and, in default of immediate payment of said fine and costs, to an imprisonment, the amount of said fine and the term of said imprisonment to be fixed by the Recorder's Court at its discretion, and any person who shall violate any such provision of the said by-law shall moreover be liable to the penalty mentioned in this section for each and every day that such violation or contravention shall last, which shall be held to be a dis-

tinct and separate offence for each and every day as aforesaid ; provided that such fine shall not exceed forty dollars and the imprisonment shall not be for a longer period than two calendar months for each and every [501] offence as aforesaid ; the said imprisonment, however, to cease at any time before the expiration of the term fixed by the said Recorder's Court upon payment of the said fine and costs."

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The first pretension of the appellant is that section 46 of the by-law requiring the payment of \$200, for a license to sell meat outside the public markets is not authorized by the statute, and is therefore in excess of the powers of the council and absolutely null and void.

[The learned Judge then discussed this question and continued, p. 503:—]

On the whole, upon the only admissible interpretation of the statute I conclude that the city council were by it invested with all the powers they assumed to exercise by the by-law.

Next it is pretended that the 31st sub-sect. to which the authority of the council to pass the by-law must be ascribed, is itself ultra vires of the provincial legislature. It is said that sect. 92 of the British North America Act does not confer on the provinces the right to invest a municipal council with powers of taxation such as this enactment assumes to confer upon the city of Montreal. The answers to this relied upon by the learned advocates for the city are, I think, clear and conclusive. For myself I prefer to select one of these grounds and to rest my judgment exclusively upon that.

It may be that since the decision of the Judicial Committee [504] in the case of *The Bank of Toronto v. Lambe* (1) a tax for municipal purposes, to be collected by means of a license imposed upon a person carrying on a specific re-

(1) 12 App. Cas. 575 ; ante p. 7.

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tail trade as a condition of being permitted to carry it on in a particular manner, or in a particular place as in the present case, is not to be regarded as an instance of indirect taxation. If this is so, it would, of course, be conclusive of the question of legislative authority which has been raised in the present case, but without in the slightest degree presuming to depart from any decision of the Privy Council, I am prepared for the purposes of the present judgment to assume the correctness of the appellant's contention that this is an indirect tax and to deal with the case upon that basis.

Then, looking at the case in this way I have no hesitation in ascribing the authority of the legislature of the Province of Quebec to pass the provision of the statute now impugned to sub-sect. 9 of sect. 92 of the British North America Act. The words of that section are as follows:—
 'Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes.' If it were necessary to do so I should be prepared to hold that the words "other licenses" include such licenses as the legislature have empowered the city of Montreal to impose by the terms of the statutes now under consideration. It never has been decided by any court of appeal that the words "other licenses" are to have no meaning whatever, and that the clause is to be restricted to the four named, but incongruous, cases of "shops, saloons, taverns and auctioneers." The case of *Severn v. The Queen* (1) did not decide this, but merely determined that a construction which would include licenses to brewers under the words "other licenses" was [505] inadmissible for the reason that it would conflict with the exclusive power to regulate trade and commerce which was vested in the Dominion. And even as regards

(1) 2 Can. S.C.R. 70; *ante* vol. 1, p. 414.

this construction of sub-sect. 9, if the decision in *Severn v. The Queen* (1) has not been overruled observations not in accordance with it are certainly to be found in the later decisions of the Privy Council. I do not, however, base my opinion on these words "other licenses" being comprehensive of a license tax, such as this, but on what appears to me to be the indisputable ground, that this is a shop license power to authorise the imposition of which is in so many words conferred on the provincial legislatures by sub-sect. 9 of sect. 92. There is nothing in the context restraining the meaning of the word "shop" to any particular species of shop, or to a shop in which any specific commodity is dealt in, and that being so there is nothing whatever to exclude from its operation a shop such as that kept by the appellant for the sale of butcher's meat. This seems, by itself, conclusive of the question of constitutional validity, and to preclude all objections to the statute.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

TASCHEREAU, J:—

By its charter the city of Montreal is authorised by sect. 123, sub-sect. 27, to "establish and regulate public markets and private butchers' or hucksters' stalls; and to regulate, license, or restrain the sale of fresh meats, vegetables, fish or other articles usually sold on markets;" Then, by sub-sect. 31; "To order that all kinds of live stock and all kinds of provision and provender whatsoever, usually bought and sold in public markets, that may be brought to the said city for sale, shall be taken to the public markets of the said city and there exposed; and that neither the said live stock nor the said provisions or provender, shall be offered or exposed for sale or be

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(1) 2 Can. S.C.R. 70: ante vol. 1, p. 414.

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sold or purchased elsewhere in the said city than on the said public markets; but the said council may, if they deem it advantageous, by a by-law to be passed for that purpose empower any person to sell, offer or expose for sale, [507] in any place beyond the limits of said markets or market stalls of the said city, meat, vegetables and provisions usually bought and sold on public markets, upon such person obtaining a license for that purpose from the said council, for which he shall pay to the city treasurer such sum as may be fixed by such by-law, and by conforming with the rules and regulations contained in the said by-law.

[The learned Judge held for reasons which he gave that the by-law was authorized by the statute, and added :—]

As to the constitutionality of the sections above referred to in the city of Montreal's charter, there is no room for controversy, and the appellant himself, though he had alleged in his declaration that these sections were unconstitutional, very properly, in his factum and at the hearing before us, abandoned that ground of his action. [508] He contends now, not that the statute is ultra vires of the Quebec Legislature, but that the by-law under that statute and upon which he was sued before the Recorder's Court is ultra vires and not authorized by this statute.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

GWYNNE, J:—

[The judgment of the learned Judge is omitted as it does not refer to the constitutional question. His Lordship concurred in dismissing the appeal.]

PATTERSON J. concurred with Taschereau J.

Appeal dismissed with costs.

THE CANADA SOUTHERN RAILWAY COMPANY

(Defendants) APPELLANTS;

AND

CHARLES S. JACKSON,

(Plaintiff) RESPONDENT.

On Appeal from the Common Pleas Division of the High Court of Justice for Ontario.

[Reported 17 Can. S. C. R. 316.]

Workmen's Compensation for Injuries Act, R.S.O. c. 141—Dominion Railways.

The Ontario Legislature by Rev. Stat., 1887, c. 141, gives to workmen, injured in the course of their employment, the right, under certain conditions, to recover compensation therefor from their employers : *Held*, that this enactment was valid and applied to the defendant company as well as other railways under the legislative control of the Dominion Parliament.

Appeal by consent from a decision of the Common Pleas Division of the High Court of Justice for Ontario, sustaining a verdict for the plaintiff at the trial.

Jackson, the plaintiff in the case, was a switch tender in the employ of defendants and the action was brought [317] in consequence of injuries caused by an engine knocking him down, when endeavouring to walk over the track to a switch in the performance of his duties.

[320] Certain questions were submitted to the jury which, with their findings thereon, are as follows :—

1. Was there negligence in the management of the engine ? A. Yes.

**Present* :—Sir W. J. RITCHIE, C. J., and FOURNIER, TASCHEREAU, GWYNNE and PATTERSON, JJ.

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2. If so, what was it? A. By not ringing the bell, and to the best of our belief the engine was moving more than four miles an hour.

3 How did the accident occur? A. Plaintiff was in the act of crossing the track to go to the switch in the performance of his duties.

4. Could the plaintiff have avoided it by the exercise of reasonable care? A. No.

5. Assuming that the plaintiff is entitled to recover, what do you think would be a fair sum for the company to pay him as damages? A. Forty-five dollars a month, in all \$1,620.

Upon these findings judgment was entered for the plaintiff, which was affirmed by the Divisional Court, on a motion to set it aside. The defendants then appealed to the Supreme Court of Canada, basing their objection to the judgment on two grounds:—

First, that the injuries being caused by a fellow-servant of plaintiff, he could only recover by virtue of the Workmen's Compensation for Injuries Act, and that Act does not apply to the defendant company, which has been declared a work for the benefit of Canada, and brought under the operation of the Government Railways Act of the Dominion.

Secondly, if the plaintiff could maintain an action he was guilty of such contributory negligence as would preclude him from recovering damages.

Symons for the appellants.

[321] That the Ontario Act is ultra vires as regards this company, see *Darling v. Midland Railway Company* (1); *Conger v. Grand Trunk Railway Company* (2); *Clarkson v. Ontario Bank* (3).

(1) 11 Practice Rep. 32.

(2) 13 Ont. Rep. 160.

(3) 15 App. Rep. 166.

S. H. Blake, Q.C., for the respondent.

The constitutional question is decided by authority : *Parsons v. Citizens' Insurance Company* (1) ; *Dobie v. Temporalities Board* (2) ; *In re Toronto Harbour Commissioners* (3).

RITCHIE, C. J. :—

(After stating the facts as given in the judgment of Galt, C. J. in the Divisional Court, His Lordship proceeded as follows :)—

On the trial the learned Judge submitted certain questions to the jury, and on the argument the whole case turned on the fourth question submitted to the jury, namely, "Could the plaintiff have avoided the accident by the exercise of reasonable care?" And to which, as we have seen, they answer, "No." The objection to the finding on this question is that it is not supported by any evidence and is against the weight of evidence. At the sitting of the Divisional Court, the defendant moved against the verdict, which was sustained. The learned Chief Justice of that Court, in delivering judgment, says :—

"As to the contributory negligence of the plaintiff, the only ground on which this could be maintained would be if the plaintiff had not taken the trouble to look towards Montrose Station before he started on the discharge of his duty ; he swears positively that he did and that when he did so, no engine was visible. This [322] question was very clear for the jury, for one witness of the name of Francis, called by the defendant, who was the fireman of the engine which occasioned the injury, gave evidence which, if believed by the jury,

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(1) 7 App. Cas. 96 ; *ante* vol. 1, p. 265. (2) 7 App. Cas. 136 ; *ante* vol. 1, p. 351.

(3) 28 Grant, 195 ; *ante* vol. 1, p. 825.

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would unquestionably have established the defence. He swore not only that he saw the plaintiff from time to time look towards the engine, but in answer to the question, "Did you see the accident? Yes. What did you see? I saw him jump sideways on the footboard of the engine and catch hold of the rail with his right hand, stepped on with his right foot. Stepped on the footboard? Yes with his right foot, and stumbled with his left, made the second stumble with his left foot which caused his right foot to slip off the board and he went right alongside of the track and threw his arm across the rails." The jury did not believe this witness, and I confess I do not see how it would be possible for the accident to happen as described by this witness. The plaintiff had been so unfortunate as to lose his left arm by a former accident, and how he could, after having caught hold of the rail of the engine, fall in such a way as to bring his right arm under the wheel of the engine, I do not understand; his own account was as I have stated, namely, that his feet were knocked from under him, and in using his right arm to throw himself off the track, his arm was crushed. It was plainly a question for the jury.

It was also urged that it was contributory negligence on the part of the plaintiff that he did not at once, on leaving the shanty, cross the northern track and walk between the two tracks. The jury must have thought that there was no negligence on the part of the plaintiff when in discharge of his duty he availed himself (the ground being wet) of the ends of the ties in approaching the switch which was distant some hundred yards from the shanty, and speaking for myself, considering the nature of the railroad tracks and that they were built on a narrow embankment, I think it was very natural for him to do so."

The motion was accordingly dismissed. An appeal was, by consent, taken direct to this Court, under the provisions of sect. 26, sub-sect. 2 of R.S.C., c. 135.

Had the bell been rung, as it was admitted at the trial it was the duty of the servants of the company to have the bell rung, while the engine is passing through the yard, it is difficult to conceive that the accident could have happened. The plaintiff was in the ordinary discharge of his duty. His duty required him to cross the track, and he had about one hundred yards to go. He was walking on the ends of the ties intending to cross [323] the track when he got to the switch which he could not reach without crossing the track.

I know of no rule of law which required the plaintiff to cross opposite the shanties in preference to going down the track and crossing opposite the switch. In either case he would have had to go down the track to reach the switch. It seems to me that the evidence in the case, in connection with the non-ringing of the bell and the rate of speed at which the jury find the engine was moving, could not have been withdrawn from the jury, and they having found that the plaintiff could not have avoided the accident by the exercise of reasonable care, and this finding having been confirmed by the Divisional Court, it should not now, in my opinion, be disturbed.

I concur in the view that the Workmen's Compensation for Injuries Act applies to the appellants' railway.

FOURNIER, J., concurred.

TASCHEREAU, J :—

I am of opinion that this appeal should be dismissed with costs. On the question of the application of the

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Workmen's Compensation for Injuries Act to Dominion Railways, I am clear that *Rowland's Case* (1) was well determined.

GWYNNE, J:—

A servant of a railway company is, in my opinion, as liable as a stranger to be found guilty of contributory negligence, when an injury occurs to him, when unnecessarily walking on the railway track in a station yard, although he does so for the purpose of discharging some duty connected with his employment, which, however, as in the present case, did not require him to walk upon the track in order to perform the service in which he was at the time engaged; and I am further of opinion that the doctrine of contributory negligence had better be abolished altogether if it can be [324] held that the plaintiff was not a party contributing by his own culpable negligence to the injury which unfortunately he has received; while we sympathize with him in his misfortune we cannot, in my opinion, acquit him of having himself by his negligence contributed to his misfortune. In my opinion, therefore, this appeal should be allowed and the action in the court below dismissed.

PATTERSON, J:—

I am of opinion that we should allow this appeal. The real question at issue was whether the injury to the plaintiff had been caused by the negligence of the defendants. It was not simply whether or not the defendants or their servants had been guilty of negligence, because they may have been guilty of negligence without that negligence being the cause of the injury.

(1) [An unreported decision of the Court of Appeal for Ontario.]

The plaintiff may have contributed to his own injury, and if he did so, he cannot properly ascribe it to the negligence of the defendants. It frequently happens that the proof given of the negligence charged in actions like this will *prima facie* sustain the charge that that negligence caused the injury, and in those cases the allegation of contributory negligence becomes a separate issue. But if in proving the circumstances under which the injury occurred the plaintiff shows that he contributed to it himself, the result is that he fails to prove the essential fact that it was caused by the negligence of the defendants. In a case of that sort the defendants are entitled to a non-suit, or a verdict in their favour upon the plaintiff's own showing. (1)

It was palpable from the plaintiff's own evidence in this case that having two routes to choose between to reach [325] the switch, one of which was safe, but somewhat muddy, and the other dangerous, he for his own convenience alone chose the dangerous one. The case might, therefore, properly have been withdrawn from the jury.

The position is not altered by the circumstance that the jury pronounced the opinion that the deceased could not, by the exercise of reasonable care have avoided the accident. I might adopt, almost literally, the language of Lord Halsbury in *Wakelin v. London and S. W. Railway Company* (2) where he said:—

“I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to enquire, because if they have found that the defendants' negligence

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(1) See Smith on Negligence 237; *Peart v. Grand Trunk Ry. Co.*, 10 App. Rep. 191; *Wright v. Midland Ry Co.*, 51 L. T. N. S. 539; *Wakelin v. London & South Western Ry. Co.*, 12 App. Cas. 41.
Davey v. London & S. W. Ry. Co., 12 Q. B. D. 70; *Bridges v. North London Ry. Co.*, L. R. 7 E. & I. App. 213; L. R. 6 Q. B. 377, 394;

(2) 12 App. Cas. 41, 46.

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caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding."

The negligence charged against the defendants was that of a fellow-servant of the plaintiff. I do not rest at all upon that fact in holding against the plaintiff's right of action, because I see no reason to doubt the application to this case of the provincial statute R. S. O. (1887) cap. 141. It is not legislation respecting such local works and undertakings as are excepted from the legislative jurisdiction of the provinces by article 10 of sect. 92 of the B. N. A. Act. It touches civil rights in the Provinces. The rule of law which it alters was a rule of common law in no way dependent on or arising out of Dominion legislation, and the measure is strictly of the same class as Lord Campbell's Act which, as adopted by provincial legislation, has been applied without question to all our railways.

I agree that the appeal should be allowed.

WILLIAM SHOOLBRED,

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Appellant ; Jan. 21, 22, 23;
 June 12.

AND

ALEXANDER STUART CLARKE,

Respondent.

IN RE UNION FIRE INSURANCE COMPANY.

[Reported 17 Can. S. C. R. 265.]

On Appeal from the Court of Appeal for Ontario.

*Bankruptcy and Insolvency—Winding-up Act, R. S. C. c. 129.—
 Provincial Corporations.*

The Dominion Parliament under its jurisdiction as to bankruptcy and insolvency has authority to provide for the compulsory liquidation or winding up of a company incorporated by a Provincial Legislature. (1)

Appeal from a decision of the Court of Appeal for Ontario (1) dismissing an appeal from the judgment of

*Present : —Sir W. J. RITCHIE, C.J., and FOURNIER, TASCHEREAU, GWYNNE and PATTERSON, JJ.

(1) [See next case]

(2) 16 App. Rep. 161 ; Sub nom. *Re Clarke and the Union Fire Insurance Co.*

[In giving judgment OSLER, J. A. (with whom HAGARTY, C.J., and MACLENNAN, J.A. concurred) said, (p. 165.) "I think, for the reasons given in my judgment and in that of Mr. Justice Patterson on the former appeal, (13 App. Rep. 268)

that this insurance company, though incorporated by a provincial statute, was subject to the Dominion winding up Act, 45 Vict. c. 23, and the amending Act of 1884, 47 Vict. c. 39. On that point there was no difference of opinion in this court."

BURTON, J.A., did not refer to the constitutional question in his judgment.]

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Boyd, C. (1), who made an order for winding up the Union Fire Insurance Company under the Dominion Winding-up Act.

On a former appeal to this Court (2) a winding-up order made by Mr. Justice Proudfoot in this matter was held defective and remitted to the court below for the petition to wind up the Union Fire Insurance Company to be dealt with anew. The matter was then brought before the Chancellor, who made an order containing, among others, the following provisions:

[266] "1. This court doth declare that the said the Union Fire Insurance Company is an insurance company within the provisions of the said Act, and is insolvent under the provisions thereof, and doth order that the business of the said company shall be wound up by this court under the provisions of the said Act and the amendments thereto.

(1) 14 Ont. Rep. 618; Sub nom. *Re Clarke and the Union Fire Insurance Co.*

[In giving judgment, BOYD, C., said, p. 620:—"This Act is in the nature of an insolvency law, affecting various trading and other corporations carrying on business in Canada. It is not of a private or local character, but affects all corporate bodies within its scope all over the Dominion. It embraces companies that are insolvent, and being for that reason unable to prosecute business, it provides for terminating their existence and realizing and distributing their assets in a just and equitable manner, as under the English winding up Acts. I have no doubt that the Act is within the competence of the Dominion Parliament, under the British North America Act, sect. 91, Art. 21, and that the present company, incorporated

under a provincial charter, is subject to its provisions. This conclusion has been, indeed, already reached by my brother Proudfoot, in this same matter, *Re Clarke and the Union Fire Insurance Co.*, 10 Ont. Rep. 489, and I do not understand that his order has been interfered with on this ground by the Supreme Court. The like view of the law has been taken in Nova Scotia in *Re Eldorado Union Store Co.*, 6 Russell & Geldert, 514. The case in the Supreme Court of *The Merchant's Bank of Halifax v. Gillespie*, 10 Can. S.C.R. 312, does not touch the status of the present company, which is a domestic corporation within the territorial limits of Canada; whereas the company there in question was, for the purposes of the Act, a foreign one domiciled in England."]

(2) 14 Can. S. C. R. 624.

"2. And this court doth further order that William Badenach, of the city of Toronto, accountant, the receiver heretofore appointed in the said case of *Clarke v. Union Fire Insurance Company*, be and he is appointed permanent liquidator to the estate and effects of the said company upon his furnishing security to the satisfaction of the master in ordinary of the Supreme Court of Judicature for Ontario before he shall intermeddle with the said estate.

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"3. And this court doth further order that it be referred to the said master in ordinary to fix the remuneration payable to the said liquidator, to settle the list of contributories, to take the accounts of the assets, debts and liabilities and all other necessary accounts, and to make all necessary inquiries and reports and do all necessary acts and give all necessary sanctions to the said liquidator for the winding up of the affairs of the said company under the provisions of the said Act and amendments thereto."

Shoolbred, a shareholder of the insolvent company, objected to this order on the grounds, mainly, that the Dominion Winding-up Act was not applicable to a company incorporated by the Ontario Legislature, and, therefore, no order could be made under it in this case; also that if the order could be made it was defective in leaving the security of the liquidator to be settled by the master, as the court could not so delegate the authority conferred on it by the Act. Both these objections were [267] overruled by the Court of Appeal and the order was confirmed. Shoolbred then appealed to the Supreme Court of Canada.

S. H. Blake, Q.C., and *McLean* for the appellant referred to *Merchants' Bank of Halifax v. Gillespie* (1).

(1) 10 Can. S. C. R. 312.

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Bain, Q.C., for the respondents cited *Re Eldorado Union Store Company* (1) and the cases relied on in the courts below.

RITCHIE, C.J :—

In this case the majority of the court are of opinion that the appeal should be dismissed. I should have liked more time to consider the matter, but my opinion could not affect the decision, and I am not prepared to dissent from the judgment of the court.

FOURNIER, J :—

I agree that the appeal should be dismissed.

TASCHEREAU, J :—

I am of opinion that the appeal should be dismissed with costs.

GWYNNE, J :—

I entertain no doubt that the winding-up Act of the Dominion Parliament, 45 Vict. c. 23, and the Acts in amendment thereof, do apply to the Union Fire Insurance Company, and that so applying those Acts are intra vires of the Dominion Parliament, and I confess that I cannot understand how it can be doubted that this court was of that opinion when it made the order which was made upon the former appeal between the same parties. It cannot be conceived that after hearing an argument upon this very ground of appeal upon the former occasion, this court would have remitted the case to be dealt with by the court below, under the provisions of the statute, in accordance with the opinion of the majority of the [268] court as to the construction of the statute, if they were of opinion that the Act did not apply to the Union Fire Insurance Company.

I still am of opinion that proceedings instituted by certain creditors of that company for the purpose of having the proceedings taken by the respondent Clarke to have the assets of the company applied in liquidation of the claims of its creditors brought under the operation of the Dominion Statute 45 Vict. c. 23, as amended by 47 Vict. c. 39, were well instituted under the provisions of the second and third sections of the latter Act, and I entertain no doubt that the order of the learned Chancellor for Ontario, which is the subject of this appeal, was a good and valid order under these Acts as the same are amended by and consolidated in cap. 129 of the Revised Statutes of Canada.

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[The remainder of the judgment is omitted as not bearing on the constitutional question.]

PATTERSON, J: [After stating the facts relating to the former proceedings against the company, the learned Judge continued, p. 273]:—

There are two branches to the present appeal.

First, it is contended that the Dominion Winding-up Act does not apply to the Union Fire Insurance Company because that company was incorporated by Provincial and not Dominion legislation; and then assuming the Act to apply to the company, it is objected that its provisions do not authorize the order made by the Chancellor.

The interpretation clause of the Act, R. S. C. c. 129, defines the expression "insurance company" as used in the Act, as meaning a company carrying on, either as a mutual or a stock company, the business of insurance, whether life, fire, marine, ocean or inland marine, accident, guarantee or otherwise; and defines the expression "winding-up order" as meaning an order granted by the

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court under that Act to wind up the business of the company, including any order granted by the court to bring within the provisions of the Act any company in liquidation or in process of being wound up.

Section 3 declares that the Act applies to certain incorporated companies, including incorporated insurance companies wheresoever incorporated, and

(a) Which are insolvent, or

(b) Which are in liquidation or in process of being wound up. and on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of the Act.

No language could be more general and comprehensive or less calculated to suggest the exclusion of any class of incorporated companies, nor has any good reason been given for thinking such exclusion can have been intended.

The provincial legislatures have, under sect. 92 of the British North America Act, exclusive power to make laws in relation to the incorporation of companies with provincial objects; but the body politic created by any such Act of incorporation becomes, like a natural body, subject to the laws of the land. There are a number of the subjects over which exclusive legislative jurisdiction is given to the Parliament of Canada, as well as others, in relation to which the parliament may make laws for the peace, order and good government of Canada, the legislation on which must govern all corporate bodies as well as natural bodies; for example, interest, legal tender, currency, taxation, the criminal law, and bankruptcy and insolvency.

In its compulsory operation upon incorporated companies the winding-up Act is an insolvency law. Companies that are not insolvent as well as those that are

may be brought under its operation by the effect of the second part of sect. 3 when they are already in liquidation or in process of being wound up. This may be on petition of creditors or assignees as well as of shareholders or liquidators; but original proceedings under [275] the winding-up Act can be instituted only by creditors and only when the company is insolvent.

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A wider power now exists under the winding-up amendment Act, 1889, 52 Vict. c. 32 (D). That Act authorizes voluntary winding up proceedings at the instance of the company or a shareholder, following in this respect sect. 129 of the English Companies Act, 1862, which is also followed by the Ontario Winding-up Act, R.S.O. 1887, c. 183. But that provision for voluntary winding up is not extended, like the winding-up Act, to all corporations. It is confined by sect. 3 to companies incorporated "by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the late Province of Canada, or of the Provinces of Nova Scotia, New Brunswick, Prince Edward Island or British Columbia, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada."

This obviously is intended to exclude companies incorporated by provincial legislation since confederation under the exclusive legislative jurisdiction given to the Provinces. Ontario, Quebec and Manitoba are not named, and misapprehension as to the four provinces which have retained their ante confederation names is shut out by the reference to the legislative authority of the Parliament of Canada. Thus, the provision for voluntary winding-up is expressly confined to a class of corporations in which the Union Fire Insurance Company is not included and the unlimited application of the

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winding-up Act to the compulsory liquidation of the affairs of all insolvent corporations is made more clear. (1)

It was argued that the third section of the Act of 1889, which I have just quoted, went to show, by the omission [276] of the name of the Province of Ontario, that the winding-up Act did not apply to this Ontario company. This court may be said to have in effect decided that it did so apply when it remitted the matter to the High Court after the former appeal; and the leave to bring forward the present appeal was granted partly, if not principally, to give an opportunity to discuss the effect of the amendment Act as a legislative explanation of the winding-up Act.

It is clear that the Act of 1889 bears on the question in no other way than to make the unlimited extent of the principal Act more manifest.

It is, it is true, to be read with and construed as forming part of the winding-up Act; but that is by the introduction into the statute of a set of provisions for the voluntary winding up of a limited class of corporations, to which provisions the expressions in sect. 3, "this Act applies," etc., must be referred. The section does not qualify or supersede sect. 3 of the principal Act. The term "this Act" means and will continue to mean the amendment Act, and not the whole winding-up Act.

There are, in this Act of 1889, specific amendments of several sections of the winding-up Act. Those sections, as amended, must continue to apply to the same companies as before, although the amendments are made by an Act which is declared to apply to a more limited class of companies. There is, doubtless, a want of precision in this particular, but the Act can be read according to

(1) [See *Re Iron Clay Brick Manufacturing Co.*, 19 Ont. Rep. 113.]

its evident intent without violence even to the literal wording. There are no restrictive words in sect. 3, such as "shall only apply"; and yet the newly introduced powers touching voluntary liquidation will be confined to the class of companies specified in sect. 3, because, being newly created, they have only the extent expressly assigned to them.

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[277] There is, in my opinion, no reasonable doubt that the Union Fire Insurance Company is subject to the provisions of the winding-up Act.

Then, is the Chancellor's order authorized by the Act?

The order declares that the company is an insurance company within the provisions of the Act, and is insolvent, and then proceeds to order;

1. That the business of the company be wound up.

2. That Wm. Badenach, the receiver, appointed in the case of *Clarke v. The Company*, be permanent liquidator of the estate and effects of the company upon his furnishing security to the satisfaction of the master in ordinary before he shall intermeddle with the estate.

3. That it be referred to the master to fix the remuneration payable to the liquidator, to settle the list of contributories, etc., etc.

4. That costs of petition, etc., be paid by the liquidator out of the assets of the estate.

5. That costs ordered to be paid to plaintiff and defendants in Clarke's case, but not paid, be paid out of the assets.

6. That accounts, etc., in Clarke's case stand and be incorporated with and used in the winding-up proceedings so far as applicable.

7. That parties who contested their liability in Clarke's case to be settled on list of shareholders shall be at

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liberty to apply to the court after the settlement of the list of contributories for the payment of such costs in Clarke's case as they may deem themselves entitled to.

We may simplify the consideration of the objections taken to this order by satisfying ourselves of the nature of the jurisdiction conferred on the court by the winding-up Act.

The starting proposition, to the overlooking of which I attribute much if not all of the difficulty that to some judges has seemed to attend the working of the Act, is that by the British North America Act the constitution and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts, is a function of the provincial legislature.

There is no a priori presumption that the Parliament of Canada in passing an Act upon a subject within its exclusive jurisdiction intends to encroach upon the exclusive jurisdiction of the province.

[278] If an Act is ambiguous in this particular, I take it that the construction to be preferred is that which accords with the declaration of our constitutional charter.

Among the subjects exclusively assigned by sect. 91 to the Parliament of Canada are interest, bills of exchange, and promissory notes, and bankruptcy and insolvency. We should be surprised to find that parliament assuming to enact that an action on a bill of exchange should always be tried by a judge without a jury, or tried at bar before the full court, or that interest on a promissory note must always be computed by the judge personally and not by a master or referee.

We should be equally unprepared to find it enacted that when a provincial court was administering an in-

solvency or bankruptcy Act the functions and powers of its officers were to be different from those exercised in an administration action or other action within its ordinary jurisdiction.

Such an enactment would amount to the constitution and organization of the court by the Dominion Parliament and not by the Local Legislature.

Yet this is what I understand to be contended is the intention and effect of the winding-up Act.

In my opinion the Act was never so intended, but, on the contrary the effort of the parliament has been to leave the court to perform its functions by means of its ordinary machinery and by its ordinary procedure.

I may refer, without repeating what I said, to the opinions on this topic which I expressed at some length in the Court of Appeal, when the appeal from the first winding-up order in this matter was heard. (1)

I then alluded to amendments of the statute which seemed to me to be dictated by the desire to make it perfectly clear that the ordinary procedure of the court and [279] the ordinary functions of its officers under the regular constitution and organization of the court, were not intended to be interfered with.

[The remainder of the judgment is omitted as not bearing on the constitutional question.]

Appeal dismissed with costs.

(1) 13 App. Rep. 283-5.

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HARRY ALLEN,

(*Petitioner*) APPELLANT;

AND

CHARLES A. HANSON ET AL.,

(*Liquidators*) RESPONDENTS.

IN RE THE SCOTTISH CANADIAN ASBESTOS
 COMPANY (LIMITED.)

*On Appeal from the Court of Queen's Bench for Lower Canada
 (Appeal Side.)*

[*Reported 18 Can. S. C. R. 667.*]

Bankrup'cy and Insolvency—Winding-up Act, R. S. C. c. 129.

The Dominion Parliament under its jurisdiction as to bankruptcy and insolvency has authority to provide for the compulsory liquidation or winding up of a company incorporated under a statute of the Imperial Parliament. (1)

Appeal from a judgment of the Court of Queen's Bench for Lower Canada, (appeal side) (2), affirming a judgment of the Superior Court, by which the respondents were appointed liquidators of the Scottish Canadian Asbestos Company (limited), under the provisions of the Dominion Winding-up Act, c. 129, of the Revised [668] Statutes of Canada, and the appellant's motion to have the order set aside and to dissolve a meeting of creditors called under the statute was rejected.

The Scottish Canadian Asbestos Company (limited), a joint stock company, incorporated under the Acts of the Imperial Parliament of 1862 and 1886, having its

*Present :—*SIR W. J. RITCHIE, C. J., and STRONG, FOURNIER, GWYNNE, and PATTERSON, JJ.

(1) [See preceding case.] (2) 16 Quebec Law Rep. 79; *post* p. 489.

head office in the city of Glasgow, Scotland, its principal business having been carried on at Arthabaska, in Canada, where its chief property and interests are situated, became insolvent, and proceedings were taken in Scotland for the winding up of its affairs, and a liquidator was appointed.

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Upon a petition made by the firm of Lucke & Mitchell, creditors of the company in which the Scottish liquidator joined, the Superior Court in and for the District of Arthabaska, Mr. Justice Billy presiding, made a winding up order under the Canadian statute R.S.C. cap. 129, and the respondents were appointed liquidators. A motion was then made by the present appellant, a large shareholder, to set aside the said winding-up order, and also to dissolve a meeting of creditors called under the statute. The motion was in the following terms, viz: "That inasmuch as the said company was incorporated under the provisions of the Joint Stock Companies' Act of the United Kingdom of Great Britain and Ireland, and is subject to the provisions of the said Imperial Act as regards its status, powers and franchises, and the rights and obligations of shareholders and contributories, and as regards all matters respecting its corporate capacity; and inasmuch as the said company is subject to the laws of the United Kingdom of Great Britain and Ireland, as regards its liquidation; and inasmuch as the winding-up Act of the Dominion of Canada does not apply to the said company; and inasmuch as the said winding-up Act, and all legislation of the Parliament [669] of the Dominion of Canada, in so far as it relates or applies to the liquidation of the said company, is ultra vires of the said Parliament of the Dominion of Canada; that the present meeting of creditors be dissolved, and

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that the winding-up order and all proceedings had herein be set aside and declared irregular and of no effect, saving to the said company and its shareholders and creditors all rights to which they may be by law entitled."

This motion was rejected. The appellant thereupon applied for and obtained leave to appeal to the Court of Queen's Bench, and that court by a majority affirmed the judgments appealed from. Thereupon the appellant obtained from the Registrar of the Supreme Court sitting as Judge in Chambers, leave to appeal as required by sect. 76 of the winding-up Act, and also the necessary order approving the security for costs under sect. 46 of the Supreme and Exchequer Court Act.

The question raised on this appeal is, whether a winding-up order under the Canadian Act can be made against a company incorporated under the Imperial Acts having assets in Canada, and whether the legislation of the Canadian Parliament providing therefor is within the powers of the said Parliament.

Smith, for appellant.

Trenholme, Q. C., for respondents.

The cases cited by counsel are reviewed in the judgments hereinafter given and in the report of the case in the court below.

RITCHIE, C. J.—(After stating the facts of the case his Lordship proceeded as follows:—)

The following cases bear on the question raised in this case:

[670] *In re Matheson Brothers, Limited* (1) the head note is:

"The court has jurisdiction under sect. 199 of the Companies' Act, 1862, to wind up an unregistered joint stock company, formed and having its principal place of

business in New Zealand, but having a branch office, agent, assets and liabilities in England.

"The pendency of a foreign liquidation does not affect the jurisdiction of the court to make a winding-up order, in respect of the company under such liquidation, although the court will, as a matter of international comity, have regard to the order of the foreign court.

"It being alleged that proceedings to wind up the company were pending in New Zealand, the court, in order to secure the English assets until proceedings should be taken by the New Zealand liquidators to make them available for the English creditors *pari passu* with those in New Zealand, sanctioned the acceptance of an undertaking by the solicitor for the English agent of the company, that the English assets should remain in *statu quo* until the further order of the court.

"*In re Commercial Bank of India* (1) approved."

Kay J.—"I think that the court has jurisdiction to make a winding-up order upon a petition of this kind, otherwise there might be no means by which the English creditors could obtain payment of their debts." (2)

And at page 230 :—

"Had it not been then for the fact of a winding-up order existing in New Zealand this court would, in my opinion, have had jurisdiction to wind up this New Zealand company having an office and carrying on part of its business here as an unregistered company within the terms of the 199th section.

"This being the case, what is the effect of the winding-up order which it is said has been made in New Zealand? This court, upon principles of international comity, would no doubt have great regard to that winding-up order and would be influenced thereby, but the question

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(1) L. R. 6 Eq. 517.

(2) 27 Ch. D., p. 228.

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of jurisdiction is a different question, and the mere existence of a winding-up order made by a foreign court does not take away the right of the courts of this country to make a winding-up order here, though it would, no doubt, exercise an influence upon this court in making [671] the order. . . . Having, therefore, jurisdiction to make a winding-up order I feel myself at liberty to sanction the acceptance of the undertaking offered by Mr. Hart. I have said thus much as to my own opinion upon the effect of the Act. But there is the authority of *In re Commercial Bank of India*, (1) in which counsel of eminence were engaged on both sides, Mr. Southgate, Q. C., Mr. Bristowe, and Mr. (now Lord Justice) Lindley being for the petitioners, and Mr. (now Lord Justice) Baggallay and Mr. Kekewich for the official liquidator of the new company. There a joint stock company formed in India, registered under Indian law and having its principal place of business in India, with an agent and a branch office in England, was ordered to be wound up under the Act of 1862, and Lord Romilly said (2) 'I think I have jurisdiction to make the order; if the company is not wound up here these persons will not be able to get their money.'

"Now that case was decided in 1868, and no authority against it has been cited."

In re Commercial Bank of South Australia, (3) a bank incorporated in Australia, carrying on business there, and having a branch office in London with English creditors and assets in England, it was held the English

(1) L. R. 6 Eq. 517.

(2) L. R., 6 Eq., 519.

(3) 33 Ch. D. 174, 178.

court had jurisdiction to make a winding-up order which would be ancillary to a winding-up in Australia. In this case the learned Judge said "If I have the control of the proceedings here, I will take care that there shall be no conflict between the two courts."

I think there is jurisdiction to make this winding-up order, which would be ancillary to the winding-up in Scotland for the purpose of getting in the Canadian assets and settling a list of the Canadian creditors as *In re Corsellis*, (1) the winding-up in England was ancillary to winding up in Australia for the same purpose, and there need not be, and should not be, any conflict between the two courts.

In the case of *The Merchants' Bank of Halifax v. Gillespie*, (2) in the view I took of this case, I considered it quite unnecessary to discuss or decide the question as to [672] the extent of the power of the Dominion Parliament to pass laws for winding-up or otherwise dealing with foreign insolvent trading companies doing business in the Dominion, because I thought the then winding-up Act, 45 Vict. c. 23, was not intended to apply to a company incorporated under the Imperial Joint Stock Companies' Acts, 1862-1867, and I was confirmed in that opinion by the action of the Dominion Parliament in passing the first section of the 47 Vict., c. 39, which repealed the first section of 45 Vict. c. 23, and substituted the first section of 47 Vict. in lieu thereof, the only alteration being the addition to the enumeration of the companies to which the 45 Vict. c. 23 is to apply of the words "which are doing business in Canada, no matter

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(1) 33 Ch. D., 160.

(2) 10 Can. S. O. R., 312.

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where incorporated " and " which are insolvent " covering it appeared to me a clear intimation that the 45 Vict. c. 23 did not so apply. The question now raised in the present case is: Was such addition within the legislative power of the Dominion Parliament, or in other words was such enactment ultra vires?

If parliament have legislated respecting strictly foreign corporations, and is not to be considered to be legislating respecting colonial corporations unless they are expressly named, (see *In re Oriental Inland Steam Company*), (1) surely it must be said that the Dominion Parliament can in its right to legislate in reference to bankruptcy and insolvency, legislate respecting insolvent companies doing business in Canada, and with reference to property of such companies within its jurisdiction.

Inasmuch then as the Dominion statute declares that the winding-up Act now applies to all companies which are doing business in Canada and no matter where incorporated, there can be no doubt of the intention of Parliament to apply the winding-up Act to foreign as well as [673] domestic incorporated companies, and as I think such an enactment is within the legislative power of the Dominion Parliament, and it being admitted that this company was carrying on its business, and held valuable lands in Canada, and was insolvent, and as the provisions of the English Companies Act 1862 are held to apply to foreign companies carrying on business in England and are worked out as nearly as may be or left not worked out as the exigencies of the case dealt with require; and inasmuch as the greater part of the assets of this company would seem to be in Canada, there is the more rea-

(1) L. R. 9 Ch., 557, 560.

son why the property within the territorial limits of the Jurisdiction of the courts of Canada should be dealt with under the provisions of the Canadian Act; in fact it is difficult to see how such property could be dealt with by the English liquidators; and inasmuch as in this case it appears that the liquidators under the English Act are acting in concert with the liquidators under the Canadian Act, I can see no reason for supposing that any conflict can possibly arise whereby this stock-holder can be in any way damnified; on the contrary it appears to me that this is the most satisfactory way by which the company can be wound up and its assets realized for the benefit of the company and all the parties interested.

All the winding-up Act, as I understand it, seeks to do in the case of foreign corporations is to protect and regulate the property in Canada and protect the rights of creditors of such corporation upon their property in Canada. It by no means follows that because all the provisions of the Act may not be applicable to foreign cases that those portions which are should not be acted on.

The fact that liquidation proceedings have already been taken in Scotland under the Imperial Act and that the Scotch liquidator acquiesces in the present proceedings under the Canadian Act affords a tolerably good guarantee that there will be no conflict of authority in this case, but whether he acquiesced or not it would be the duty of the courts of both countries to see that no conflict should arise.

STRONG J.:—

In the case of *The Merchants' Bank of Halifax v. Gillespie* (1) my judgment did not proceed upon the ground

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that the legislation there invoked was unconstitutional but I stated as a reason for not adopting the construction there contended for, that such an interpretation would give to the statute an effect which would be ultra vires of the Parliament of Canada. That case raised the question of the validity of winding-up proceedings under our statute as the sole and principal winding-up of a company registered under the English Act of 1862. I adhere to what I there said as applicable to the principal and original winding-up of such a company to which case my opinion was intended to apply, and alone did apply.

In the present case, however, the winding-up order has been granted upon the petition of the liquidator under a liquidation previously instituted under the Act of 1862 in Scotland, and as ancillary to that principal winding-up. The effect of the winding-up here can therefore only be to entitle the liquidator appointed under it to realize the assets and after paying creditors (not merely creditors within his jurisdiction, but all creditors) to remit the balance (if any) of the assets to the liquidator in Scotland to be applied and distributed as may there be directed by the proper forum.

In other words this winding-up is subsidiary to the same proceeding which had been previously instituted in the forum of the domicile of the corporation. I am of [675] opinion that an order thus limited as this is authorized by the statute, and that it is entirely within the powers of the Dominion Parliament to confer such a jurisdiction.

The appeal must be dismissed.

[Translated.]

FOURNIER, J.:—

The sole question raised by the present appeal is whether the creditors of the insolvent company living in this country are able in concert with the liquidators named by the court in Scotland to subject the said company to the provisions of the Canadian Winding-up Act as regards the property of the company in Canada.

The appellant contends that the federal parliament has not the power to pass an Act which can apply to a company incorporated in virtue of the Imperial Acts, Winding-up Acts of 1862-7, and that in consequence the judgments and proceedings which have taken place in this case with that object are void and of no effect.

In support of this contention the appellant cites the decision of this court in *Merchants' Bank of Halifax v. Gillespie* (1).

The question decided in that case was merely whether a company incorporated abroad could be put in liquidation in virtue of our winding-up Act, and the court decided that the Act, 45 Vict. c. 23, was not applicable to such a company, but without deciding anything on the subject of the constitutionality of the Act. That is the reason given by Sir W. J. Ritchie, C.J., who relied on the Act 47 Vict. c. 39 amending sect. 1 of 45 Vict. by adding thereto in the enumeration of the companies to which this Act should apply, those "which are doing business in Canada no matter where incorporated," because he said this amendment had been passed after the commencement of the proceedings, and nothing indicated that it was to have a retrospective effect. He also

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[676] deduces therefrom the confirmation of his opinion that the Act 45 Vict. c. 23 was not applicable to the proceedings submitted to the court.

Now if the question could create difficulty before the amendment, had that amendment the effect of removing it by declaring that this Act should apply to companies doing business in Canada, no matter where incorporated? To me who maintained in *Merchants' Bank of Halifax v. Gillespie* (1) that the Act 45 Vict. c. 23 ought to be applied to insolvent companies doing business and possessing property in the country, it appears that this amendment has had the effect of removing all difficulty as regards the application of the law, and that there should be no hesitation in declaring it applicable to foreign corporations. In this case there would remain for decision only the single question raised by the appellant as to the constitutionality of the law.

The company in question has first been placed in liquidation in Scotland, and the demand for submitting it to the winding-up Act of the country has been made with the consent of the liquidator nominated by the Court of Scotland, and the liquidators nominated here have been so on the demand of the Canadian creditors and of the liquidator authorised in Scotland.

The respondent asserts that the proceedings adopted in this case are supported by the authorities, and he relies on the case of the *Commercial Bank of South Australia* (2), cited as authority by Lindley on the law of companies (p. 644) as follows:—

“ Bank incorporated and carried on business in Australia ; not registered here, but had a branch office in

(1) 10 Can. S. C. R. 312.

(2) 33 Ch. D. 174.

London. Winding-up proceedings were pending in Australia. North, J., made an order, but expressed an opinion that the proceedings here should be ancillary to those in Australia, and that the liquidator should only deal with assets in this country. Compare *Matheson Brothers, Limited*, (1) when no order was made."

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[677] Lindley is further cited in order to establish that the courts in England can place in liquidation in virtue of the Imperial Act colonial or foreign companies, and that they can act as auxiliaries of the colonial courts for property in England. Why could not the Canadian courts do as much for the English courts in what concerns the property in Canada and especially in the present case since they would act by request of the court charged with the liquidation? Although the tribunals are independent one of another they are not on that account less bound to lend the assistance of their authority to enforce the execution of laws, the object of which is to regulate interests common to the citizens of both countries.

But independently of this agreement with respect to the liquidation I think that the action of our tribunals is of itself sufficient to attain this end. I have expressed this opinion in the case of the *Merchants' Bank of Halifax v. Gillespie* (2), and I do not consider it necessary to recur to this point.

The question whether the federal parliament had the right to pass the winding-up Acts seems to me free from difficulty. The liquidation of insolvent societies and companies in the same way as the bankrupt laws are clearly within the jurisdiction of the federal parliament. Our parliament has complete and absolute power to legis-

(1) 27 Ch. D. 225.

(2) 10 Can. S. C. R. 312.

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late on this subject and is no way subservient to the Imperial Parliament. This question has been so often decided that it is useless to recur to it. It is a settled point.

The argument that the Act of the federal parliament is contrary to the Imperial Act and consequently void [678] is entirely without foundation. There is no Act of the Imperial Parliament forbidding our parliament from legislating on this subject; on the contrary there is one which confers this power in terms namely, the British North America Act, sect. 91, sub-sect. 21.

To render void an Act of the federal parliament it would not be sufficient that it was contrary to English law—but that it should be opposed to a positive law made binding on Canada in express terms or by necessary intendment, and further only such parts of the law would be held invalid as were directly in conflict with the Imperial enactment. Mr. Justice Willes in the case of *Phillips v. Eyre* (1), thus expresses himself on this point :

“ It was further argued that the Act in question was contrary to the principles of English law and therefore void. This is a vague expression and must mean either contrary to some positive law of England or to some principle of natural justice, the violation of which would induce the court to decline giving effect even to the law of a foreign sovereign state. In the former point of view it is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an imperial statute or order made by authority of such statute applicable to the colony by express words or necessary intendment; and that, so far as such repugnancy extends, and

(1) L. R. 6 Q. B. 1, 20.

no further, the colonial Act is void. The 28 & 29 Vict. c. 63, s. 2, enacts that, 'Any colonial law which is, or shall be, in any respect repugnant to the provisions of any Act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' And to remove all doubt, s. 3 of the same Act affirmatively enacts that 'no colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of parliament, order or regulation as aforesaid.' "

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[679] The Imperial Acts relating to the liquidation of companies do not apply to Canada, and it is an established principle that the Imperial parliament does not legislate as to property situate outside of the United Kingdom. This legislation therefore cannot affect ours which is perfectly constitutional and should have as extended an application as possible to effect the liquidation asked for.

Appeal dismissed.

GWYNNE, J. :—

I can add nothing to the judgment of the learned Chief Justice of the Court of Queen's Bench, Sir A. A. Dorion. I entertain no doubt as to the correctness of that judgment, and am of the opinion that the appeal should be dismissed with costs.

PATTERSON, J. :—

The Scottish Canadian Asbestos Co. (limited) was incorporated on the 31st day of July, 1886, under the Imperial Companies' Acts, 1862 to 1886. Its registered

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office is in Glasgow, but its chief place of business is in the Province of Quebec where it owns real and personal property and has carried on the business of quarrying and working for asbestos.

The company being insolvent an order was made in November, 1888, by the Court of Session in Scotland, that the company be wound up under the provisions of the Companies' Act, and appointing a liquidator. The liquidator, by authority of the Court of Session, appointed the respondents, Hanson Brothers, for the purpose amongst other things—

“ For and on behalf of me as liquidator aforesaid, to appear before and to apply to such courts of law in Canada aforesaid as my said attorneys and attorney shall deem necessary to have effect given to the order to wind up said company pronounced by the said Lords of Council and Session aforesaid, as also, if need be, to apply for an [680] order to wind up said company in Canada, either as auxiliary to the Scotch liquidation or otherwise, or to consent to any such winding up.”

The application to the court for leave to appoint the attorneys set out, and the power of attorney recited, that the company had its principal assets in Canada, and that considerable sums of money were due by the company to creditors resident in Canada. Thereupon a petition, in which the Scotch liquidator joined, was presented to the Superior Court in the District of Arthabaska in Quebec, Mr. Justice Billy presiding. A winding-up order was made under the Canadian Statute (R.S.C. cap. 129), and Messrs. Hanson Brothers were appointed liquidators.

The appellant, who is a large shareholder in the company, moved against that order, and also to dissolve a meeting of creditors called under the statute. That

motion was dismissed by Mr. Justice Billy, and his judgment was affirmed on appeal by the Court of Queen's Bench. The present appeal is from that decision.

The grounds of appeal are that the Canadian Winding-up Act does not apply to this company, and that in so far as it professes to apply to the company it is ultra vires of the Parliament of Canada.

The first point is answered by the express language of the statute which declares in sect. 3, that the Act applies to incorporated trading companies doing business in Canada, wheresoever incorporated; and (a) which are insolvent; or (b) which are in liquidation or in process of being wound up, and on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of this Act.

This declaration, which was introduced into the Winding-up Act after the proceedings in *The Merchants' Bank of Halifax v. Gillespie* (1) had been commenced, [681] though before the judgment of the court was pronounced, alters the law from that which was held by a majority of the court to result from a correct interpretation of the Act as it formerly stood, so that we can hold that foreign corporations are within the operation of the Act without conflicting with the judgment which declared that they were not within its operation at the earlier date.

The question of ultra vires is, however, still undecided in this court, because, although it was advanced in *The Merchants' Bank of Halifax v. Gillespie* (1) and opinions upon it were expressed by two of the learned judges who denied the jurisdiction and by one who affirmed it, it was not pronounced upon by the court.

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Two points are made against the existence of the legislative jurisdiction. It is argued that it is conclusively negatived by the Imperial Statute, 29 & 30 Vict. c. 63, which declares in sect. 2 that any colonial law which is or shall be in any respect repugnant to the provisions of any Act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

To sustain this objection two things are essential: the Imperial Act of parliament must extend to the Dominion, and the Dominion Winding-up Act must be repugnant to the Imperial Companies' Act.

I do not think the appellant has succeeded in maintaining either of these propositions. The first section of the statute of 29-30 Vict. c. 63, which is the interpretation clause, declares that an Act of parliament or any provision thereof shall, in construing that Act, be said to [682] extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of parliament.

There are certainly no express words contained in the Companies' Act of 1862, or in any of the amending Acts, extending their provisions to Canada, or to any of the Provinces comprised in the Dominion, and it is equally difficult to trace in their provisions an intendment that they shall so apply. On the contrary, we find the provisions relating to practice and procedure in winding up proceedings framed with exclusive reference to the British

Islands. A distinct instance of this is afforded by sect. 122 of the Act of 1862, which provides for enforcing in any one of the three divisions of the United Kingdom orders made in the courts of any other division, but makes no allusion to enforcing such orders in any colony.

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The Companies' Acts, therefore, do not extend to Canada. Nor is there any repugnancy between their provisions and the power now questioned of making a winding-up order by a Canadian Court in the matter of an English or Scotch company which does business in Canada, has a place of business here, owes debts here, and has assets here. To hold such an order repugnant to the English Acts would be to question the cases, of which there is a consistent series, in which the English courts have made orders to wind up colonial companies, or, as in one case, have asserted the power while refusing, as an exercise of discretion, to make the order. See *In re Union Bank of Calcutta* (1); *In re Commercial Bank of India* (2); *In re Commercial Bank of South Australia* (3); [683] *In re Matheson Brothers* (4); Westlake's *Private International Law* (5); Thring on *Joint Stock and other Companies* (6); Lindley on *Company Law* (7). See also the judgment of my brother Fournier in *Merchants Bank of Halifax v. Gillespie*, (8) which is for the most part applicable to this case, and in which I entirely concur.

Patterson, J.

It is true that our courts cannot exercise with regard to an English company the full extent of the powers conferred by our winding-up Act. For example, they cannot, by the effect of a winding-up order, affect the

(1) 3 DeG. & Sm. 253.

(2) L. R. 6 Eq. 517.

(3) 33 Ch. D. 174.

(4) 27 Ch. D. 225.

(5) 2nd ed., sect. 124.

(6) Notes under sect. 199 of the Companies Act, 1862, 5th ed., 302.

(7) 5th ed. 622.

(8) 10 Can. S.C.R. 312, 326.

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operations of the company in England, causing it to cease to carry on its business there, as under sect. 15 the company must do in this country. But the same difficulty was presented when the English courts were asked to make orders to wind up colonial companies, and was held not to affect the jurisdiction. See particularly the observations of Mr. Justice Kay, *In re Matheson Brothers* (1) and Mr. Justice North, *In re Commercial Bank of South Australia*. (2)

The fallacy in this particular may perhaps have been contributed to by an idea that an order called a winding-up order, made in pursuance of an Act called a winding-up Act, must be inoperative if, in its potential effect, it must stop short of winding-up or dissolving the company.

The expression usually employed in our statute is "winding-up the business of the company," though the phrase "the winding-up of the company" is sometimes used, as e. g. in sect. 42. The terms are convertible, and the former readily adapts itself to the operation of the order now in question, which is to wind up the business carried on by the company in Canada, though our courts may be as powerless as the English courts find themselves in dealing with colonial companies, to dissolve the corporation or to administer the assets that are beyond the territorial limits of their jurisdiction.

Some extracts from the company's articles of association have been put in evidence, and an argument against the jurisdiction of the Canadian Court has been based on sect. 125, which reads as follows :

"If the directors shall pass a resolution recommending the company to be dissolved, and a general meeting shall

(1) 27 Ch. D. 225, 228.

(2) 33 Ch. D. 174, 178.

in pursuance of such recommendation resolve that the company be dissolved, and a second general meeting shall confirm that resolution, then the company shall henceforth subsist and carry on business for the purpose of winding up its affairs, and its affairs shall be wound up, and it shall be dissolved in accordance with, and subject to the provisions of 'The Companies' Acts, 1862 to 1883,' which are and may be applicable in the voluntary winding up of a company under the same, or the occurrence of an event in which it is provided that a company under the same may be wound up voluntarily."

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One has only to read this to see that it cannot affect the present contest. It is a contract among the members of the company, and deals only with a voluntary winding up which may be brought about in a specified manner. There is no pretence of dictating to the creditors of the company what remedies they may employ or what forum they must resort to to enforce their remedies.

On these grounds, and without thinking it necessary to discuss the recognition of the company by the issue of letters patent in the Province of Quebec, or the effect of the Scotch liquidator being a party to the proceedings here, I am of opinion that the judgment should be affirmed and the appeal dismissed with costs.

Appeal dismissed with costs.

JUDGMENTS IN QUEBEC COURT OF Q. B.—APPEAL SIDE.

[Reported 16 Quebec Law Rep. 79.]

CROES, J.:—

On the 7th May, 1889, Mr. Justice Billy, holding the Superior Court at Arthabaska, granted the petition and motion of G. Lucke et al, creditors, for the appointment of a liquidator to the Scottish Canadian Asbestos Company (Limited) and thereupon appointed Charles and Edwin Anson, of Montreal, liquidators.

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Power to abolish	ii. 494
See BANKRUPTCY AND INSOLVENCY, 9.	
Power to impose	ii. 527
See CRIMINAL LAW, 7.	
INDIAN LANDS—Those “lands reserved for the Indians,” which by sect. 91. sub-s. 24, of the B. N. A. Act are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, and have been reserved for their use and do not include lands to which the Indian title has been extinguished. The Ontario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold; all unpatented lands, whether Indian lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation. — <i>Church v. Fenton</i> . —C. P., Ont. i. 831	
2. Sect. 109 of the B. N. A. Act of 1867 gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, subject to such rights as the Dominion can maintain under sects. 108 and 117. — <i>Attorney-General of Ontario v. Mercer</i> , (8 App. Cas. 767) followed. By royal proclamation in 1763 possession was granted to certain Indian tribes of such lands “parts of our dominions and territories” as, not having been ceded to or purchased by the Crown, were reserved, “for the present,” to them as their hunting grounds. The proclamation further enacted that all purchases from the Indians of lands reserved to them must be made on behalf of the Crown by the Governor of the colony in which the lands lie, and not by any private person. In 1873 the lands in suit, situate in Ontario, which had been in Indian occupation until that date under the said proclamation, were, to the extent of the whole right and title of the Indian inhabitants therein, surrendered to the Government of the Dominion for the Crown, subject to a certain qualified privilege of hunting and fishing: — <i>Held</i> , that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the	

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Indian title, which was “an interest other than that of the Province in the same,” within the meaning of sect. 109: <i>Held</i> also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein. — <i>St. Catherine's Milling and Lumber Co. v. The Queen</i> . — P. C. . . . iv. 107	
INFORMATION—Nuisance i. 813;	
See ATTORNEY-GENERAL	ii. 559
INSOLVENCY	
See BANKRUPTCY AND INSOLVENCY.	
INSURANCE—Regulation of contracts i. 265	
See TRADE AND COMMERCE, 1.	
Tax on Policies	i. 117
See TAXATION, 2.	
Taxation of Companies	iv. 7
See TAXATION, 6.	
INTEREST—The general law having limited the rate of interest, in the absence of agreement between the parties, to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. “increase” on overdue assessments, the so-called increase being but another name for interest. A municipal corporation was authorized by an Act in force at the time of confederation to charge ten per cent. on overdue assessments; the Legislature of Quebec passed an Act repealing this enactment, and providing anew for a similar charge: <i>Held</i> , by Johnson, J., that the former enactment was effectually repealed, and that the new enactment as to increase was invalid. — <i>Ross v. Torrance</i> . —Superior Ct., Quebec . . . ii. 353	
2. The general law having provided that on any contract or agreement any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bearing the agreed rate of interest, was held to be within the competence of the Provincial Legisla-	

erty in the jurisdiction where found. All such liens, privileges or priority of right existing in the jurisdiction where the property may be placed, have to be determined and enforced according to the law of that locality. The foreign liquidator cannot claim the property except subject to such priority. The local law with regard to priority of registration is also binding on the foreign liquidator.

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The rule accords with the decisions of the courts in England and Scotland, not taking into account the jurisdiction which the statutory law there may have given the courts over foreign resident, when found in England. See 3 Burge's Foreign and Colonial Laws pp. 904 to 914 inclusive, and reference there to Lord Loughborough's opinion in *Hunter v. Potts*, (1) Westlake (ed. 1880), pp. 142 [81] and 125; Lawrence's Wheaton, p. 144, et seq. Savigny, pp. 258 and 259, pp. 567 and 372 et seq., A. pp. 335 and 253; Bell's Commentaries on the Laws of Scotland, vol. 2, p. 681, et seq.; Fiore, Droit International Privé, p. 568, et seq., Nos. 373, et seq., to 378.

The rule above stated does not apply where there is a local law in conflict with its operation.

By sect. 3 of cap. 129 of the Revised Statutes of Canada, the law for the winding up of companies is made to apply to companies doing business in Canada wheresoever incorporated. There is no doubt the Scottish Canadian Asbestos Company (Limited) is included in this provision. It may, however, be a question whether this is a conflicting law and whether, if it be so, it is ultra vires of the Dominion Legislature. As regards its being a conflicting law it may be urged with much reason that there cannot be two separate jurisdictions exercising the same functions simultaneously in the particular individual case. There is a possibility, however, of the one acting as auxiliary to the other and until the objection was raised there could be no doubt that the local jurisdiction here could be availed of.

If even the liquidator in Scotland had the preferable right, he might consider it of the greatest advantage not to make his claim until the local liquidators had effectually gathered in the assets.

However this might be, and admitting for the sake of argument that the local law in question conflicted with the general, still, the

(1) 4 Phillimore, 544.

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question remains as to whether the local, that is the Dominion law, is not ultra vires of the Dominion Legislature. This I find to be an extremely delicate question, but one for which we may fairly conclude we have a precedent by the Supreme Court in the case of *The Merchants' Bank of Halifax v. Gillespie* (1) for although the point was not there necessarily in question, yet from the freely expressed opinions of at least two of the judges, one other not expressing any dissent on this point, we may conclude that the opinion of the majority of that court was that the legislation in question subjecting foreign joint stock companies to the winding up process of Canadian courts was ultra vires of the Dominion Legislature, especially in that it conflicted with the Imperial legislation directing such companies incorporated under the English statutes to be [82] wound up in Great Britain. I think in the present condition of the jurisprudence we should hold it to be so.

As to the second question, I cannot doubt the capacity of the appellant to make the objection and raise the question. In the case of *The Merchants' Bank of Halifax v. Gillespie* (1) it was raised by a creditor. Allen is not a creditor but a large shareholder and there might be a surplus over paying the debts in which he would have an interest. He has an interest to invoke the English law and courts rather than the Canadian, if he judges them more efficient to collect debts and settle questions as to contributories and as to other rights of the parties. He has such an interest as entitles him to be a party to the proceedings and is therefore entitled to demand that they should be set aside as illegal. It has been contended that the supplementary letters patent obtained in the Province of Quebec might give the necessary jurisdiction there. I do not think so. These were only to give effect to the charter under the Imperial Statutes.

On the whole I think the judgment should be to reverse the decision of the Superior Court and to set aside the winding up proceedings.

The judgment of the majority of the court (2) was delivered by DORION, C. J.:—

The appellant who is a stockholder of the Scottish Canadian Asbestos Company (Limited), now insolvent, complains of a judg-

(1) 10 Can. S. C. R. 312.

(2) DORION, C. J., and TESSIER, BABY and BOSSÉ, JJ.

ment by which the respondents were appointed liquidators of the company under the provisions of the Dominion Winding-up Act, cap. 129 of the Revised Statutes of Canada.

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The objection urged by the appellant, both here and in the court below, is that the company was incorporated under the Imperial Companies Act, 1862-1886; that it is subject to the laws of the Imperial Parliament as regards its franchises, corporate capacity, and its liquidation; that the winding-up Act of Canada does not apply to this company, and that in so far as it purports to relate or apply to the liquidation of the company, it is ultra vires of the Parliament of the Dominion of Canada.

By the articles of association the head office of the company was to be in Scotland, and it was provided that in case of dissolution, its affairs should be wound up in accordance with the provisions of the Imperial Companies Act, 1862-1883; the principal business of the company was, however, to be carried on in Canada, and was, in [83] fact, carried on in the Province of Quebec, and for that purpose the company obtained letters patent under article 4764 of the Revised Statutes of the Province of Quebec.

There is no doubt as to the insolvency of the company, which is in liquidation under proceedings now pending in Scotland.

The only question to be determined is whether the creditors of a company organized under the Companies Act, 1862-1886, of the Imperial Parliament but doing business in the Province of Quebec where it holds both real and personal property, can avail themselves of the provisions of the winding-up Act, cap. 129, of the Revised Statutes of Canada, to realize the property of the company within the Province of Quebec or within the Dominion in order to secure the payment of their claims.

The provisions of the winding-up Act of Canada are applicable: first, to insolvent companies; second, to companies in liquidation or in process of being wound up.

They regulate the proceedings of our courts to enforce the rights of creditors and of shareholders on the property of such companies.

As they only relate to procedure, their operation is confined to property found within the territorial limits of the jurisdiction of the courts authorized to enforce them. For the same reason, within such territorial limits, their operation can neither be regulated nor

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restrained by any foreign legislation. Foelix, *Droit International Privé*, Vol. 2, pp. 40, 41, 42, Nos. 318, 319 and 320.

Story *Conflict of Laws*, sect. 539, after citing the rule laid down by Boullenois, *Pr. Gen.* 1, 2, pp. 2-3, that "the laws of a Sovereign rightfully extend over persons who are domiciled within his territory, and over property which is there situate," adds; "On the other hand no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." *Idem*, sects. 549-553. Having stated these general principles in relation to jurisdiction, (the result of which is, that no nation can rightfully claim to exercise it, except as to persons and property within its own domains), etc., the same writer says; "It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted, or as the civilians uniformly express it, according to the *lex fori*."

[84] The same legislative authority which can prescribe the mode in which sheriffs and other judicial officers may attach, sell and dispose of the real and personal property of a debtor to satisfy the claims of his creditors may also, without exceeding its powers, direct that the seizure, sale and disposal of the property, in this country, of incorporated companies, may take place by other officers acting under the orders and directions of the courts; and this is what has been done by the winding-up Act, enacted by the Dominion Parliament.

But it is said that the winding-up Act, besides providing for the sale and distribution of the property of insolvent companies, when found in this country, also provides that a list of contributories shall be settled and their rights established, and that the business of the company shall cease, and that all transfers of shares and alterations in the status of the members of the company, after the commencement of the winding up, shall be void.

From the principle already stated, that the laws of sovereignty only extend over persons domiciled within the territory of the Sovereign, and over property which is there situated, it is evident that the Dominion Parliament never intended to regulate, suspend, or dissolve by the winding-up Act, any corporation existing under British or foreign authority, but merely to regulate their property and restrain their action in this country, which it undoubtedly had a right to do. The several legislative bodies in Canada can have no concern in what a foreign corporation may do elsewhere, they are only interested in protecting the rights of creditors of such corpor-

ation upon their property within this country, and more particularly the rights of their own citizens, and of resident creditors. There are in every statute enactments which do not apply to every case coming under its provisions ; this does not destroy the effect of such enactments as are applicable to the particular case to be acted upon ; and even if such enactments were ultra vires, the remainder of the Act would still remain in force, in so far as it is applicable to foreign corporations and their property in this country.

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Our attention was called, at the argument, to the case of *The Merchants' Bank of Halifax v. Gillespie*. (1)

If I understand rightly the report given of that case, the only point raised by the parties and decided by the court, was that the [85] winding-up Act, 45 Vict. cap. 23, Canada, did not apply to the Steel Company of Canada (Limited), incorporated in England under the Companies' Act, 1862-1867. This objection has been removed by the 47 Vict. cap. 39, which has declared that the winding-up Act should apply to all incorporated companies doing business in Canada, no matter where incorporated. As this last Act was passed since the question was raised in the *Case of the Merchants' Bank of Halifax*, (1) there can now be no doubt as to the intention of Parliament to apply the winding up Act to foreign as well as to domestic incorporated companies. See also Revised Statutes, Canada, cap. 129, sect. 3, and sect. 108, sub-sect. 5.

It is true that two of the honourable judges who sat in the *Case of the Merchants' Bank of Halifax*, (1) expressed doubts as to the authority of the Dominion Parliament to apply such a law to a company deriving its charter under an Imperial Statute, as this would be in conflict with the Imperial Act, 28 & 29 Vict. cap. 63.

It can hardly be contended that a declaration in the articles of association of a company incorporated in Great Britain, under the Imperial Companies Act, that the company intend to carry on business in Canada, can have the effect of relieving the company from the operation of Canadian laws as regards their property, and the dealings of such company in Canada.

If this authority to carry on business in Canada had been conferred on the company by a special Act of the Imperial Parliament such enactment should be construed as permissive only, so as to enable the company to do business elsewhere than in Great Britain, without

(1) 10 Can. S. C. R. 312.

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forfeiture of its charter, and not as overriding the laws of Canada any more than the laws of any foreign country to which its operations might extend.

The Imperial Act 28 & 29 Vict. cap. 63, can only refer to such legislation by a colony as is inconsistent with the laws or statutes of the Imperial Parliament applying specifically to such colony.

The right, not only of the Dominion Parliament, but also of the legislatures of the several Provinces of Canada, to legislate with regard to and impose conditions upon companies doing business in Canada although incorporated under the provisions of the Imperial Statutes, was expressly recognized in the case of *Citizens' Insurance Co. v. Parsons* (1).

[86] This very company, the Scottish and Canadian Asbestos Co., had to obtain a license under 43-44 Vict. cap. 38, Quebec, before it could transact business in this country, and I am not aware that the authority to require such a license as well as licenses issued in the case of insurance companies, Rev. Stat. c. 124, sect. 4, has ever been questioned.

As to the rules of international law, which were invoked in the *Case of the Merchants' Bank of Halifax*, (2) they may have been applicable to that case, which arose in Nova Scotia, but they are foreign to the principles of the French law which prevail in this Province; and it is by the rules and principles of the French law, and not according to those of any international law not recognized here, that this case must be decided.

Foelix, *Droit International Privé*, t. 2, No. 847; "En France, la jurisprudence maintient rigoureusement, en cette matière, le principe de l'indépendance des États; elle refuse aux étrangers l'autorité de la chose jugée ainsi que l'exécution sur les biens et sur la personne du débiteur qui se trouve en France."

Idem, t. 2, No. 368—2 al:—"Ainsi, la décision étrangère qui accorde à une maison de commerce également étrangère un sursis (moratorium) aux poursuites de ses créanciers n'empêche pas qu'il soit pratiqué en France des saisies-arrets au préjudice de cette même maison de commerce."

Idem, No. 368—5e. al:—"L'étranger déclaré failli dans son pays n'est pas toujours réputé tel en France, et ses créanciers français

(1) 7 App. Cas. 96; ante vol. 1, p. 265.

(2) 10 Can. S.C.R. 312.

peuvent néanmoins le faire assigner personnellement devant un tribunal de France."

"Le concordat consenti à l'étranger par les créanciers d'un failli étranger, et homologué par les juges de son pays, ne peut être opposé en France aux créanciers français, qui refusent d'y adhérer." Q. B., Québec.

Laurent, Droit Civil International, t. 7, p. 239, No. 179 :— Dorion, C. J.,
 "Des meubles situés en France et appartenant à un étranger sont saisis. Quelle loi suivra-t-on, le statut personnel de l'étranger ou le statut réel de la situation? Le statut réel, sans doute aucun, tout le monde est d'accord."

Idem, No. 181, pp. 242, 243 et 244—No. 210, pp. 264-5—No. 211, pp. 265, 6, 7—Foelix, Droit International Privé, t. 2—No. 868, p. 206—"Ainsi, en France, le jugement étranger ne fera pas obstacle aux poursuites individuelles contre un failli déclaré tel par un tribunal de sa patrie."

[87] Demangeat, in his notes, p. 209 of same work says : "Il va sans difficulté qu'un tribunal français peut, suivant les cas, déclarer la faillite d'un commerçant étranger; c'est là une mesure conservatoire. Il y a plusieurs décisions en ce sens, etc."

Masse, Droit Commercial, t. 2, No. 809, p. 77.

Pardessus, Droit Commercial, No. 1488, bis. Merlin, Rep. Vo Faillite & Banqueroute, sect. 2 par. 2, art. 10, Idem, Questions de droit, Vo. Jugement, par. 14, and in fact all the French authors, without exception, are of opinion in accordance with the jurisprudence that proceedings in insolvency in a foreign country do not control either the movable or immovable property of the insolvent to be found in France, as against French creditors who are entitled to all the remedies secured by the French law against their debtors.

The courts here, as in France, will recognize the proceedings of a foreign tribunal in matters of insolvency, to the extent of recognizing the capacity of assignees or trustees to represent the estate of bankrupts in this Province, when no adverse interest has been acquired in this country over such estate, otherwise they will only be allowed to claim property in the Province of Quebec, subject to all the equities and adverse rights of creditors and others, to be determined and settled according to our laws and not according to the laws of the country of the domicile of such insolvent. Article 1981, Civil Code.

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It is contended here that liquidators appointed in Scotland can alone dispose of the property in this country of the insolvent company, and that they have the right to remove the proceeds to Scotland in order to distribute such proceeds according to the laws of the domicile of the company. If this could be done the judgment which sanctioned their appointment would have conferred upon them greater powers than the insolvent company would have had. The company could never have removed or attempted to remove its property from this country, to the prejudice of the creditors here, without giving them the right to attach such property and prevent its being taken abroad (Art. 834, C.C.P.), and the contention that the assignees or liquidators, who are merely the legal administrators of the estate, could derive from a foreign judgment more authority over the property of the insolvent company than the company had, cannot be entertained here.

[88] Another difficulty arises about the real estate of the company in this Province. Are the Scotch liquidators seized of that property as well as of the personal estate, by virtue of their appointment in Scotland, and if not, how is that property to be dealt with, except under the orders and rulings of our own courts, and through such officers as they may choose to appoint under the laws of this Province?

But supposing the liquidators in Scotland had all the authority which is claimed for them, it would seem that they alone could complain of the proceedings to appoint liquidators under the winding-up Act in force in Canada. They do no such thing. They assent to the proceedings taken here and look upon them as ancillary to their own proceedings to arrive at a final winding up of the estate.

The appellant is a shareholder, and as such is a mere contributory, and it is difficult to understand what real interest he can have in having the distribution of the property in this country made elsewhere than where the property and most of the creditors are, unless it be to deprive the latter of such rights and privileges as our law would afford them, which purpose ought not to be encouraged by the courts here.

I therefore consider that, both in law and in equity, the respondent's pretensions are well founded, and the judgment of the court below should be confirmed.

CLARKSON V. THE ONTARIO BANK, (1)
AND
EDGAR V. THE CENTRAL BANK OF CANADA.

[*Reported 15 App. Rep. (Ont.) 166.*]

*Bankruptcy and insolvency—Property and civil rights—48 V. c. 26,
(R.S.O. c. 124.)*

There being no Statute of the Dominion on bankruptcy and insolvency an Act was passed by the Ontario Legislature for the purpose of enabling insolvent debtors to place their creditors on an equal footing, but not relieving the debtor from arrest or interfering with his after acquired property: *Held*, by Burton and Patterson, J.J.A., affirming on this point the judgments of the courts below (Hagarty, C.J., and Osler, J.A., dissenting) that the Provincial Act was *intra vires*.

The plaintiff was the assignee of the firm of William Kyle and Company; and in his statement of claim set forth that that firm on the 22nd of September, 1885, made an assignment to him:

That on the 27th of August, 1885, the firm being in insolvent circumstances, etc., paid to the Bank \$509.60:

That on the 28th of the same month the firm paid to the Bank \$2,900:

That on the 4th of September, 1885, the firm paid to the Bank \$2,995.97:

And that on the 12th of the same month the firm paid to the Bank \$3,000.

[167] And the plaintiff claimed that such payments were void under the provisions of the Statute of Ontario, 48 Vict. c. 26, as against the plaintiff and the creditors of the said firm.

**Present* :—HAGARTY, C.J.O., and BURTON, PATTERSON and OSLER, J.J.A.

(1) [The report in 15 App. Rep. 166 includes two other appeals, viz: *Kennedy v. Freeman* and *Hunter v. Drummond*, but the judgments in

those cases are omitted here as they do not bear on the constitutional question.]

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Legislatures. If it does not come within any of such classes, the Provincial Act is of no validity. If it does, these further questions may arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, which states the legislative powers of the Dominion Parliament, and whether the power of the Provincial Legislature is or is not thereby overborne.—*Debie v. Temporalities Board.*—P. C. . . . i. 351

4. A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of whom were living), the Provincial Legislature of Ontario passed an Act (34 Vict. c. 99) for dividing the property among the testator's children forthwith: *Held*, that such an Act was within the competence of the Provincial Legislature; but the Court held further (Draper, C.J., and Spragge, O., dissenting) that the testator's grandchildren, not having been expressly named in the Act, and there being no express and explicit enactment specifically referring to and barring their rights, their interests remained unaffected by the Act.—*Re Goodhue.*—C. A., Ont. . . . i. 560

5. Provincial Legislatures are not restricted to legislation respecting property such as bonds held in the Province, and where debts and other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of a Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province.—*Jones v. Canada Central Railway Co.*—Q. B., Ont. . . . i. 777

6. Provincial Legislatures have, as incident to their express powers under the B.N.A. Act, the right to summon witnesses, and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation, and the control assigned to them in respect of the administration of public affairs. The provisions of the Act of the Quebec Legislature, 35 Vict. c. 5, regulating this right are valid. Ramsay, J., dissenting.—*Ex parte Dansereau.*—Q. B., Quebec ii. 165

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7. A Provincial Legislature has authority to determine the age or other qualifications which shall be required on the part of persons resident in the Province, to entitle them to manage their own affairs, or to exercise certain professions or branches of business attended with danger or risk to the public. If laws on these subjects incidentally affect trade and commerce, this incidental power must be deemed to be included in the right to deal with those matters which are specially placed under provincial control. The Quebec Pharmacy Act of 1875, so far as it requires certain qualifications on the part of persons exercising the business of selling drugs and medicines, is valid. The Provincial Legislatures have the right to appropriate fines to municipal or other corporations.—*Bennett v. Pharmaceutical Association of Quebec.*—Q. B., Quebec ii. 250

8. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals, or well being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made bona fide with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby.—*Keefe v. McLennan.*—Supreme Ct., N.S. ii. 400

PUBLIC INJURY.—Proper officer to complain of.
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PUBLIC HARBOUR.—Jurisdiction and ownership. ii. 147
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See STATUTES.

QUEEN'S COUNSEL.—[Appointment of.] A Provincial Legislature has no power to authorize the Lieutenant-Governor to appoint Queen's Counsel,

gard to these matters being exclusively vested by the British North America Act in the Parliament of the Dominion.

That the legislature of Ontario had no power to legislate in respect to the matters assumed to be dealt with by the Act, and especially with regard to assuming to confer upon a debtor's assignee the right of maintaining actions such as the present, and assuming to deal with the estates of persons in insolvent circumstances in the manner they had been by the Act, which contained provisions and enactments based entirely upon insolvency or bankruptcy, and without the occurrence of which such provisions would be improper and unnecessary.

Under any circumstances the Act did not vest in the plaintiff the right to maintain this action, nor did it confer on him such rights, powers or authorities as enabled him to call in question the transaction mentioned in the statement of claim.

The plaintiff could only maintain this action by force of the 48 Vict. c. 26, and that Act did not come into force until the 1st of September, 1885, and was not retroactive in its effect.

At the time of the alleged payments to the bank, referred to in the statement of claim, the payments were legal and valid, and he submitted that they were not rendered illegal and invalid by reason of the statute subsequently coming into force; and that nothing in the Act gave colour to the contention that a payment or act valid when made or done was to be rendered invalid upon the Act coming into force; and it was clear that the Act was not intended to apply, and could not be construed to apply to any payment made prior to that date.

J. H. McDonald, Q.C., for Clarkson. The demurrer admits that the payments in question, i.e., those made in August, 1885, were made under the circumstances and

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within the time mentioned in sub-sect. 3, of sect. 3, of the Act respecting assignments for the benefit of creditors; [169] and there is nothing in the Act to indicate that an assignment made within thirty days after the Act came into force (1st September, 1885), is to have a different operation and effect from that of an assignment made after that date, and the judgment in question does not give to an assignee, under an assignment made within thirty days after the passing of the Act, the benefit of this sub-section. In giving full effect to the words of this sub-section no hardship is worked in the present case. The Act was passed on the 30th March 1885, and the proclamation bringing it into effect was issued on the 15th July, following. From that date the defendants knew that an assignment might be made under the Act on the 1st September, 1885, under which all payments made after the 1st August, 1885, would be open to attack; and in order to give full effect to the language used it is not necessary to shew that the Act has a retrospective operation: under the words of this sub-section the payments made in August, 1885, were void, and Clarkson, the present plaintiff, is entitled to recover the same for the benefit of the general body of creditors. Under the Act the plaintiff as assignee of the insolvent firm has a right to maintain this action, and to recover from the defendants the moneys in question or a portion thereof. He also contended that the Act was *intra vires* of the legislature of the Province of Ontario, being legislation in respect of property and civil rights; and did not come within the subjects of bankruptcy and insolvency within the meaning of the British North America Act, as it did not enable a creditor, *in invitum*, to take proceedings for the seizure, sale and distribution among the creditors of the assets of the debtor; neither did it provide for a discharge of the debtor. *Regina v. Inhabi-*

tants of St. Mary, Whitechapel, (1); *Regina v. Leeds and Bradford R. W. Co.*, (2); *Cornill v. Hudson*, (3); *Towler v. Chatterton*, (4); *Pardo v. Bingham*, (5); *Re Tate*, (6), were referred to.

[170] HAGARTY, C. J.:—

The point chiefly to be decided in these four appeals before us, is, as to the validity of an Act of the legislature of Ontario, passed 30th March, 1885, 48 Vict. c. 26, (O.) entitled "An Act respecting assignments for the benefit of creditors."

It is contended for the appellants that the Act is ultra vires as infringing the exclusive jurisdiction of the Dominion Parliament in bankruptcy and insolvency.

The preamble states, "whereas great difficulty is experienced in determining cases arising under the present law relating to the transfer of property by persons in insolvent circumstances, or on the eve of insolvency, and it is desirable to remedy the same." It then repeals a couple of sections of former Acts, and by sect. 2, enacts that every gift, assignment, payment, etc., of goods and chattels, bills, bonds, notes, etc., or of any other property, real or personal, made by any person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat or delay or prejudice creditors, or to give any preference, or which has such effect, shall, as against them, be utterly void.

Sect. 3. Declares this shall not affect any assignment made to the sheriff of the county, or to another assignee with consent of creditors, for the purpose of ratably and without preference paying his creditors, etc.

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(1) 12 Q.B. 120.

(2) 18 Q.B. 343.

(3) 8 E. & B. 429.

(4) 6 Bing. 258.

(5) L.R. 4 Ch. 735.

(6) 5 U.C.L.J. 260.

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Sect. 4. Every assignment for general benefit under this Act shall be valid if it profess to convey all his person-
alty and realty, etc., and such assignment shall vest in the
assignee all his realty and personalty, etc., whether
vested or contingent, except such as are exempt from
seizure in execution.

Sect. 5. Provides for the case of the debtor owing
debts individually, and as a co-partner, and for the rank-
ing of claims on the estate by which they were con-
tracted, and shall only rank on the other after all the
creditors of that other have been satisfied.

Sect. 6. Allows a specified majority of creditors to sub-
stitute another assignee for the sheriff.

[171] Sect. 7. The exclusive right of suing for the
rescission of agreements or deeds, etc., made or entered
into in fraud of creditors shall be in the assignee, and
provides for the case of the assignee declining to prose-
cute a claim ; by leave of the judge a creditor may, after
indemnifying the assignee, use his name and obtain the
exclusive benefit of the suit, etc.

Sect. 8. Allows the recovery of money or goods, or
proceeds thereof, if sold, from any person who received
them from the assignor under circumstances prohibited
by sect. 2.

Sect. 9. An assignment under the Act shall take pre-
cedence of all judgments and executions not completely
executed by payment.

Sect. 10. Allows a judge to amend or correct any
mistake, defect or imperfection in a deed of assignment.

Sect. 16. Directs the assignee to convene a meeting
of creditors in five days for the appointment of inspectors
and providing for the disposal of the estate.

Sect. 17. Provides for the voting of creditors by proxy
or personally, but not to vote without filing an affidavit
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Sect. 18. Provides for the number of votes on a scale relative to the amount of claim. . . . Creditors on making proof, to state as to securities held and value the same ; and assignee, with the consent of creditors, may either consent to valuation and proof for balance, or require assignment of security at an advance of ten per cent. over specified value, etc. . . . Then follow directions as to negotiable paper, on which the debtor is only indirectly or secondarily liable ; this must be valued also.

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Sect. 19. Holders of claims not accrued [qu. matured] may prove and vote, but interest to be deducted for the time it has to run.

The following session, 1886, cap. 25 was passed, making certain amendments as to payments by a debtor, and as to securities held by creditors before assignment ; and as to securities given for pre-existing debts.

Sect. 4. Provides that when a new assignee is appointed under the Act, the estate shall vest without [172] transfer, with provisions as to dividend sheets and after notices to creditors, and power to pay dividends on all claims not objected to within a named time.

In the session of 1887, a second amending Act, cap. 19, was passed. Sect. 2, as to sales and payments ; that payments or transfers made of property validly obtained by a purchaser to a creditor, should be void against the creditor to whom it was made, if under circumstances which would avoid it if made directly by the debtor.

Sect. 3. Every assignment not void by sect. 2 of the first Act not made to the sheriff or an assignee with the creditors' assent, shall be void as against a subsequent assignment made in conformity with the Act.

Sect. 6. If a creditor claiming to rank, does not within reasonable time furnish proofs, the judge on the assignee's application may notify him to the judge's

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satisfaction, and if the creditor make default, he shall be wholly barred of any right to share, and the assignee may distribute the estate as if no claim made; the debtor remaining liable.

Further provision is also made for contestation of claims, and for calling meetings, and by sect. 11, if a sufficient number of creditors do not attend, the County Judge may give all necessary directions as to disposal of the estate.

In *Clarkson v. Ontario Bank*, the assignment was made under the first Act on 22nd September, 1885, which came into force 1st September, 1885.

In *Edgar v. Central Bank*, assignment made 13th July, 1886, after the first amending Act.

In *Hunter v. Drummond*, assignment 15th July, 1886; *Kennedy v. Freeman*, assignment 7th June, 1886. The three last named cases being since the first amending Act.

The appellant says that this Act is ultra vires, as trenching on the subjects of bankruptcy and insolvency, reserved for the exclusive jurisdiction of the Dominion Parliament; that it is to all intents a law for the judicial administration of an insolvent's estate by means unknown to the common law, and conferring rights on an assignee in addition to and beyond all rights assigned to him by the debtor.

[173] The respondents deny this, and insist that the law falls within the right of legislation as to property and civil rights; that it does not enable a creditor to take proceedings, in invitum, for the distribution of the estate, and does not provide for a discharge of the debtor.

The question is of very serious import and requires our gravest consideration.

Taking the last objection first, I cannot consider it of substantial force. An Act can, I think, be unquestion-

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very large majority of bankruptcies were founded on the voluntary assignment of the debtor.

I entertain the opinion that an Act providing for the judicial administration of insolvent estates is not the less an Act on bankruptcy and insolvency, because it happens that it only provides for the application of its provisions to the case of persons voluntarily putting it in operation or because it does not provide for compulsory liquidation on named acts of bankruptcy.

The law-making power may, in its discretion, limit or widen the means of putting the Act in motion, but what we have to look to is its general object and effect.

The general object and scope has been often stated as in 2 Kent Com., p. 390 :

“The general principle that pervades the English bankrupt system, is equality among creditors who have not previously and duly procured some legal lien upon the estate of the bankrupt; and in order to attain and preserve that equality, the bankrupt's estate, as soon as an act of bankruptcy is committed, becomes a common fund for the payment of his debts, and he loses the character and power of a proprietor over it.”

There is a very good summary of authorities in 1 Bouv. Law Dictionary, p. 807, title “Insolvency.”

The latter term is much larger than that of bankruptcy; it “enlarges the sense;” *Parker v. Gossage*, (1)

“The bankrupt law is entirely an innovation on the common law, which left the creditors of an insolvent debtor at liberty to take such proceedings as they could by means of the ordinary process of the Courts for the recovery of their debts, and made no provision for securing and distributing the estate of the debtor for the equal benefit of his creditors or for relieving the debtor, etc.”

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